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THE LAW OF MORTGAGES
OF
REAL ESTATE

BY
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PREFACE.

In this book the authors have endeavoured to state the law relating to mortgages of realty as administered in the courts of the Canadian Provinces other than Quebec. The aim has been to set forth the main body of the law in a treatise of moderate compass, which would be more than a mere hand-book, but at the same time less extensive in its scope than the exhaustive works of Fisher and Robbins. The general principles which form the basis of the law of mortgages have been discussed, and the modifications of the general law effected by the Dominion and Provincial statutes, and by the decisions of the Provincial courts and of the Supreme Court of Canada have been indicated. A work of this kind, it is thought, will prove more generally useful to the practitioner than the more elaborate works above mentioned, which contain much that is not applicable to Canada.

The work is divided into five parts:

- Part I. The contract of mortgage—its form and incidents, and who may be parties thereto.
- Part II. Rights and liabilities of the mortgagee.
- Part III. Rights and liabilities of those claiming under the mortgagee.
- Part IV. Rights and liabilities of the mortgagor.
- Part V. Rights and liabilities of those claiming under the mortgagor.

This arrangement, it is believed, affords a logical and satisfactory division of the subject.

While it cannot be hoped that a work dealing with a subject so difficult and comprehensive will be free from errors, the authors, nevertheless, trust that their labours will prove of assistance to the profession.

The thanks of the authors are due to Mr. J. T. C. Thompson, Barrister-at-law, who rendered valuable assistance in the preparation of the section relating to building society mortgages, and to Mr. A. Bedford-Jones, Barrister-at-law, who verified the authorities cited.

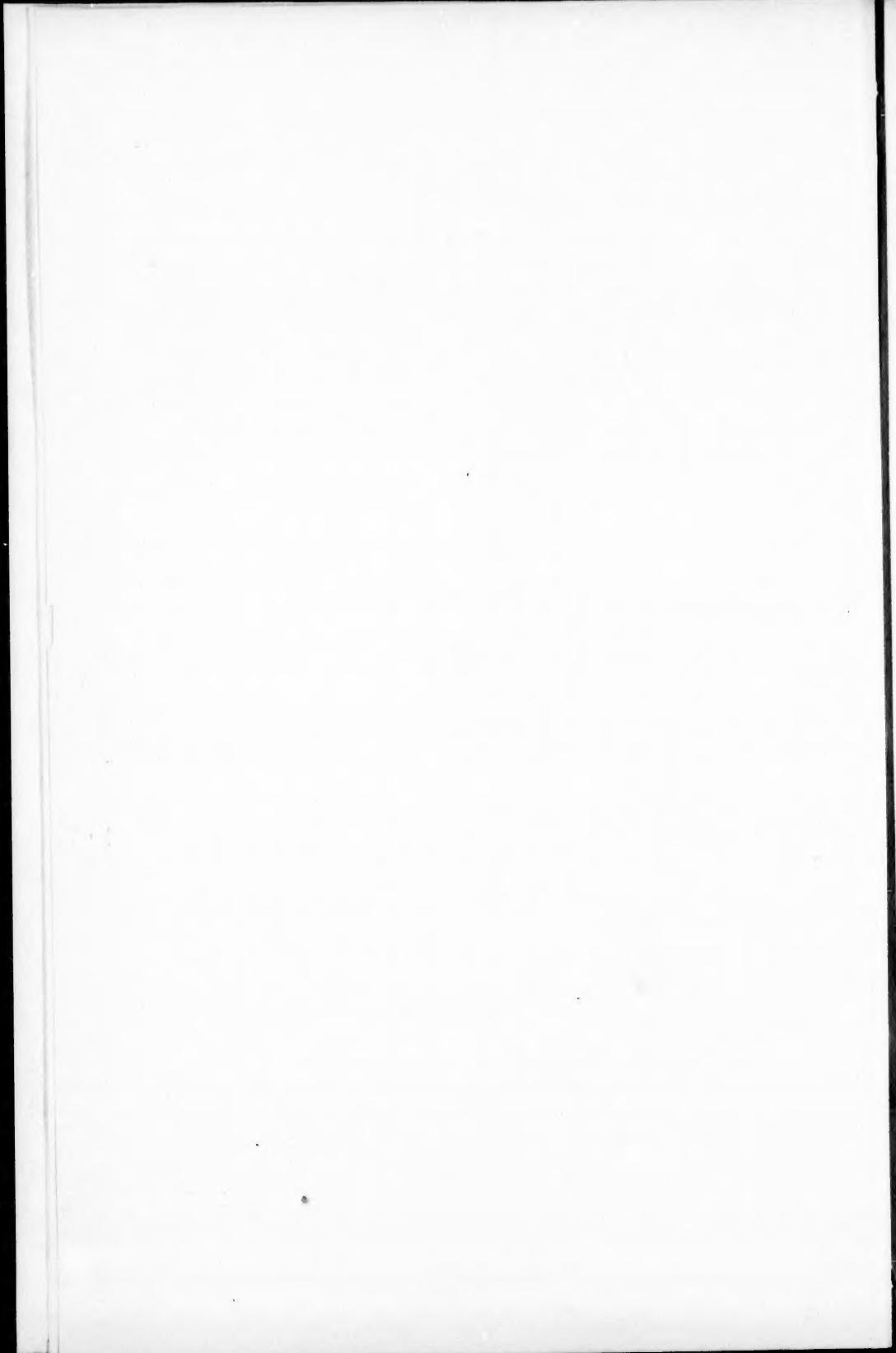


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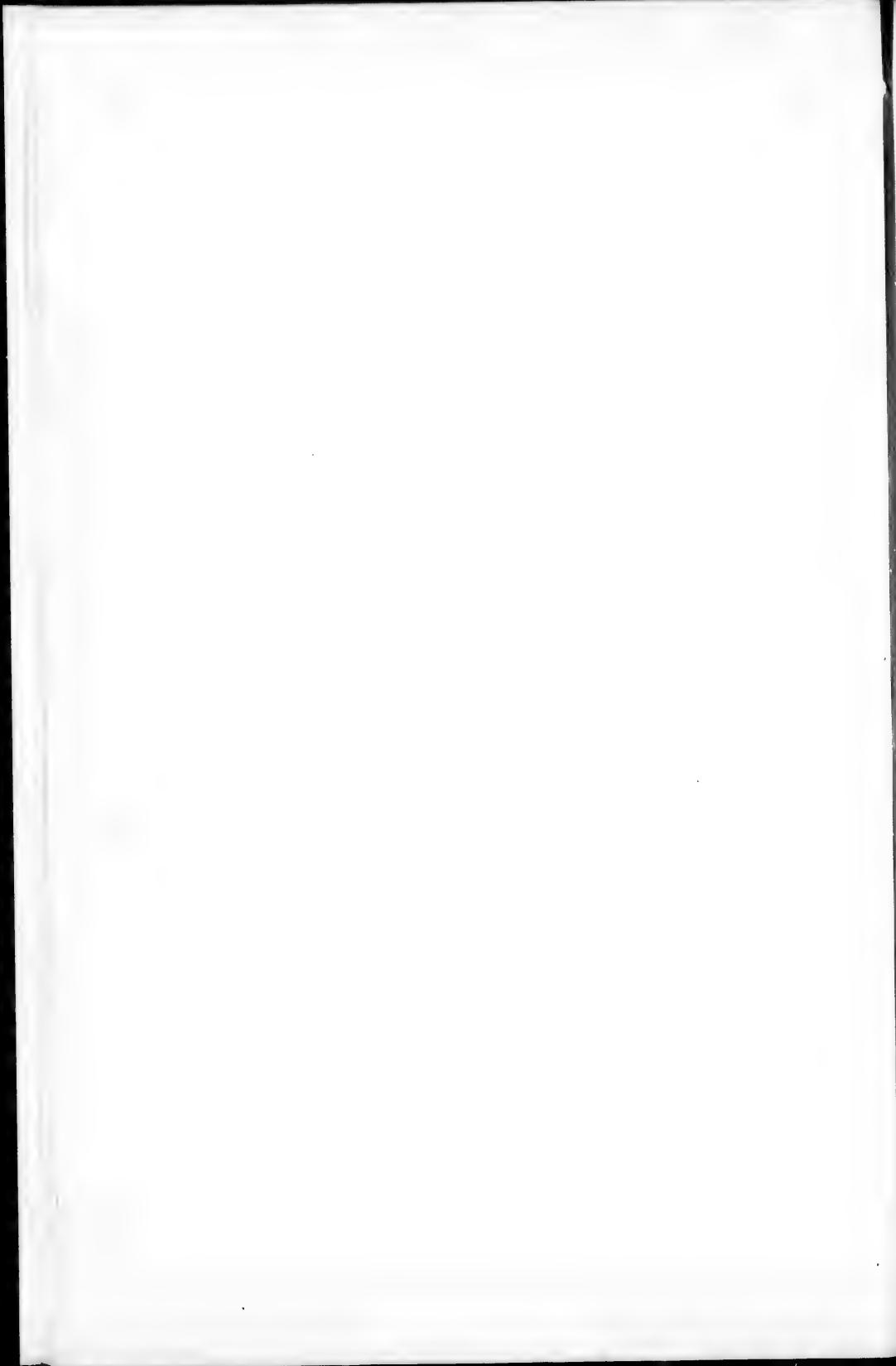


TABLE OF ABBREVIATIONS.

A

A. & E.....	Adolphus and Ellis.....	Q. B. 1834-1841
All. (New Bruns.).....	Allen, New Brunswick.....	Sup. Ct. 1848-1871
Ambl.....	Ambler	Chy. 1737-1783
Anst.....	Anstruther	Exch. 1792-1794
App. Cas.....	Law Reports, House of Lords and Privy Council, Appeal Cases	1875-1891
Atk.....	Atkyns.....	Chy. 1736-1755

B

B. & Ad.....	Barnewall and Adolphus.....	K. B. 1830-1834
B. & Ald.....	Barnewall and Alderson.....	K. B. 1817-1822
B. & B.....	Ball and Beatty.....	Irish Chy. 1807-1814
B. & C.....	Barnewall and Cresswell	K. B. 1822-1830
B.C.C.....	Brown, Reports of Cases.....	Chy. 1778-1794
B.C.R.....	British Columbia Reports.....	Sup. Ct. 1867-—
B. & S.....	Best and Smith.....	Q. B. 1861-1870
Beav.....	Beaven.....	Rolls Ct. 1838-1866
Bing.....	Bingham	C. P. 1822-1834
Bing. N.C.....	Bingham, New Cases.....	C. P. 1834-1840
Bli. N.S.....	Bligh, New Reports	H. L. 1827-1837
Brod. & B.....	Broderip and Bingham	C. P. 1819-1822
Bunb.....	Bunbury	Exch. 1713-1741
Burr.....	Burrow.....	K. B. 1756-1772

C

C.B.....	Common Bench.....	C. P. 1845-1856
C.B.N.S.....	Common Bench, New Series	C.P. & Ex. Ch. 1856-1865
C.L.J.....	Canada Law Journal.....	1865-—
C.L.T.....	Canadian Law Times.....	1881-—
C.P.....	Common Pleas.....	—
C. & P.....	Carrington and Payne.....	Com. Law 1823-1841
C.P. D.....	Law Reports, Common Pleas Division ...	1875-1881
C.S.N.B.....	Consolidated Statutes New Brunswick.....	—
C.S.U.C.....	Consolidated Statutes, Upper Canada.....	—
Ch.....	Law Reports, Chancery Appeals.....	1865-1875
Ch. Ca.....	Cases in Chancery.....	1660-1693
Ch. D.....	Law Reports, Chancery Division.....	1875-1891
Ch. Rep.....	Reports in Chancery.....	1616-1688

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Chy. Ch.	Grant, Chancery Chambers, Upper Canada and Ontario	1858-1872
Cl. & F.	Clark and Finelly	H. L. 1831-1846
Coll.	Collyer	Chy. 1844-1846
Com.	Comyns	K. B., C. P. & Exch. 1696-1740
Con. & Law.	Connor and Lawson	Chy. 1841-1843
Cox	Cox, Cases in Equity	Chy. 1783-1796
Cr. and J.	Crompton and Jervis	Exch. 1830-1832

D

D. & C.	Deacon and Chitty	Bankruptey 1832-1835
De G.F. & J.	De Gex, Fisher and Jones	Chy. App. 1859-1862
De G. & J.	De Gex and Jones	Chy. App. 1856-1859
De G.J. & S.	De Gex, Jones and Smith	Chy. App. 1862-1865
De G.M. & G.	De Gex, Maenaghten and Gordon	Chy. App. 1851-1857
De G. & S.	De Gex and Smith	Chy. App. 1846-1852
Doug.	Douglas	K. B. 1778-1785
Dr. & Sm.	Drewry and Smale	Chy. 1859-1866
Dr. & Wal.	Drury and Walsh	Chy. 1837-1841
Dr. & War.	Drury and Warren	Chy. 1841-1843
Drew.	Drewry	Chy. 1852-1859

E

E. & A.	Grant, Error and Appeal (Upper Canada)	1846-1866
E. & B.	Ellis and Blackburn	Q. B. 1852-1858
E.B. & E.	Ellis, Blackburn and Ellis	Q. B. 1858
E. & E.	Ellis and Ellis	Q. B. 1858-1861
East	East	K. B. 1800-1812
Ed.	Eden	Chy. 1757-1766
Eq.	Equity Reports	Chy. 1853-1854
Ex.	} Exchequer Reports	Exch. 1847-1856
Exch.		
Ex. D.	Law Reports, Exchequer Division	1875-1880

F

Freem.	Freeman	K. B. & C. P. 1670-1704
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G

Giff.	Giffard	Chy. 1858-1865
Gr.	Grant, Upper Canada and Ontario	Chy. 1849-1881

H

H. & C.	Hurlstone and Coltman	Exch. 1862-1866
H.L.	House of Lords	—
H.L.C.	House of Lords Cases	1847-1866
H. & M.	Hemming and Miller	Chy. 1862-1865

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H. & N.	Hurlstone and Norman	Exch. 1856-1862
Ha.	Hare	Chy. 1841-1853
How.	Howard, Practice Reports, New York	1844-1884

I

I.R.C.L.	The Irish Reports, Common Law Series	1867-1878
I.R.Eq.	The Irish Reports, Equity Series	1867-1878
Ill.	Illinois Reports	1832-—
Ir. Ch.	Irish Chancery Reports	1850-1866
Ir.L.R.	Irish Law Reports	Q. B. & C. P. 1838-1850

J

J. & La T.	Jones and La Touche	Chy. 1844-1846
J. & W.	Jacob and Walker	Chy. 1819-1821
Johns.	Johnson	Chy. 1858-1860
K. & J.	Kay and Johnson	Chy. 1854-1858
Kee.	Keen	Rolls Ct. 1836-1838
Kerr (New Bruns.)	Kerr, New Brunswick	Supreme Ct. 1840-1848

L

L.J. Ch.	Law Journal Chancery	1832-—
L.J.K.B.	" King's Bench	1832-1837
L.J.Q.B.	" Queen's Bench	1837-—
L.R.C.P.	Law Reports, Common Pleas	1865-1875
L.R. Eq.	Law Reports, Equity	1865-1875
L.R. Ex.	Law Reports, Exchequer	1865-1875
L.R.H.L.	Law Reports, English and Irish Appeals	1865-1875
L.R. Ir.	Law Reports (Ireland)	1878-1893
L.R.P.C.	Law Reports, Privy Council Appeals	1865-1875
L.T.	Law Times	1843-—
L.T.N.S.	Law Times Reports, New Series	1859-—

M

M.D. & De G.	Montague, Deacon and De Gex	Bankruptey 1840-1844
M. & G.	Manning and Granger	C. P. 1840-1845
M. & W.	Meeson and Welsby	Exch. 1836-1847
Mac. & G.	Macnaghten and Gordon	Chy. 1849-1851
Madd.	Maddock	Chy. 1817-1829
Man. R.	Manitoba Law Reports	1884-—
Mass.	Massachusetts Reports	1804-—
Me.	Maine Reports	1820-—
Mer.	Merivale	Chy. 1815-1817
Mod.	Modern Reports. Common Law and	Chy. 1660-1702
Moll.	Molloy	Chy. 1827-1828
Moo.	Moore	C. P. and Exch. 1817-1825

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Moo. P.C.	Moore, Privy Council.....	1836-1862
My. & Cr.	Mylne and Craig.....	Chy. 1835-1840
My. & K.	Mylne and Keen	Chy. 1832-1835

N

N.B. Eq.	New Brunswick Equity Reports	1894-—
N.J.L. R.	New Jersey Law Reports.....Com. Law	1790-—
N.S.R.	Nova Scotia Law Reports.....Sup. Ct.	1875-—
N.W.T.R.	North-West Territories Reports	1896-—
N. Y.	New York Reports.....Ct. of Appeals	1847-—

O

Old. (N.S.).....	Oldright, Nova Scotia.....Sup. Ct.	1860-1866
Ont.	Ontario Reports.....	1881-—
Ont. App.	Ontario Appeal Reports	1876-—

P

P.R.	Practice Reports (Upper Canada and Ontario)	1850-—
P. Wms.	Peere WilliamsK. B. & Chy.	1695-1735
Peake Ad. Ca.	Peake Additional Cases	K. B. 1795-1812
Penn.	Pennsylvania State Reports	1845-—
Phill.	Phillips	Chy. 1841-1849
Price.	Price.....	Exch. 1814-1824

Q

Q.B.	Queen's Bench Reports.....	1841-1852
Q.B.D.	Law Reports, Queen's Bench Division....	1875-1891

R

R.	The Reports	1893-1895
R.C.	Ruling Cases.....	—
R. & J. Dig.	Robinson and Joseph, Digest Upper Canada and Ontario.....	—
R.R.	Revised Reports.....	—
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R.S.C.	Revised Statutes Canada.....	—
R.S.M.	Revised Statutes Manitoba.....	—
R.S.N.S.	Revised Statutes Nova Scotia	—
R.S.O.	Revised Statutes Ontario	—
Rep. t. Finch.	Reports of the time of Finch.....Chy.	1673-1680
Russ.	Russell	Chy. 1826-1829
Russ. (N.S.)....	Russell, Nova Scotia, Equity Decisions..	1873-1882

S

Sim.	Simons.....	Chy. 1826-1852
Sim.N. S.	Simons, New Series.....	Chy. 1850-1852

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Sim. & St.....	Simons and Stuart	Chy. 1822-1826
Sm. & G.....	Smale and Giffard.....	Chy. 1862-1858
Swanst.....	Swanston.....	Chy. 1818-1819

T

T.R.	Term Reports, or Durnford and East. K.B. 1785-1796
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U

U.C.C.P.	Upper Canada Reports	C. P. 1850-1882
U.C.Jur.	Upper Canada Jurist	1844-1848
U.C.L.J.O.S.	Upper Canada Law Journal, Old Series ..	1855-1864
U.C.O.S.	Upper Canada Reports, Old Series.....	K. B. & Q. B. 1833-1844
U.C.R.	Upper Canada Reports.....	Q. B. 1844-1882

V

V. & B.	Vesey and Beams.....	Chy. 1812-1814
Ventr.	Ventriss.....	K. B. & C. P. 1668-1691
Vern.	Vernon	Chy. 1680-1718
Ves.	Vesey, Junior	Chy. 1789-1816
Ves. Sen.	Vesey, Senior	Chy. 1746-1755

W

W.N.	Weekly Notes.....	1866-—
W.R.	Weekly Reporter.....	1832-—
Wm. Bl.	William Blackstone	1746-1780

Y

Y. & C.C.C.	Younge and Collyer.....	Chy. 1841-1843
Y. & C. Ex.	Younge and Collyer.....	Exch. 1834-1842
Y. & J.	Younge and Jervis.....	Exch. 1826-1830

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[189—] Q.B.....	Queen's Bench Division..... 1891—
[189—] P.....	Probate Division 1891—

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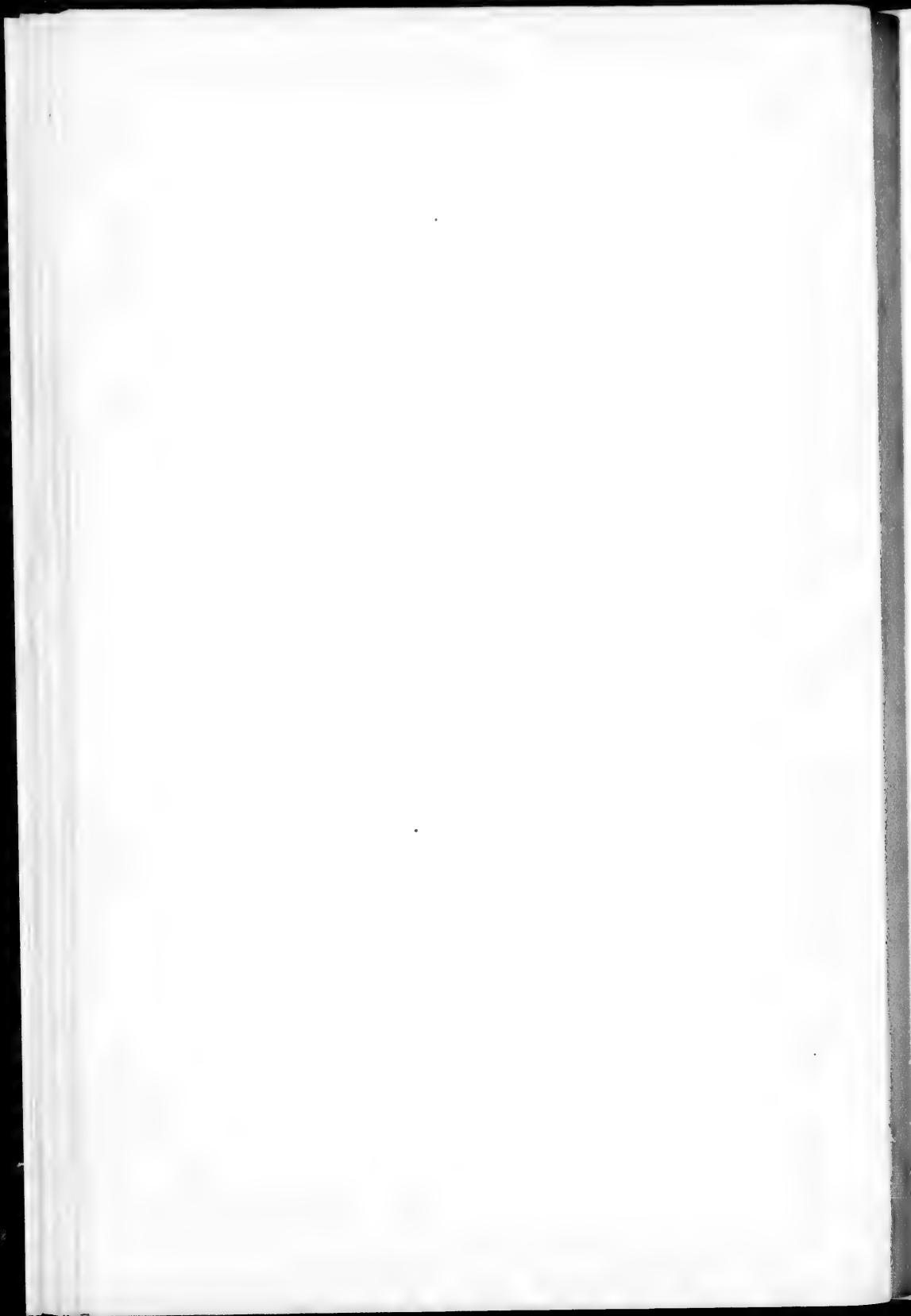
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"	"	691	72	257
"	"	692	73	258
"	"	693	75	257
"	"	694	74	257
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"	"	719	83	262

ONTARIO RULES—*Continued.*

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Consolidated Rules	1897	720	84	262
"	"	721	85	263
"	"	722	86	263
"	"	724	88	263
"	"	725	89	263
"	"	726	90	263
"	"	728	92	264
"	"	729	93	264
"	"	730	94	264
"	"	731	95	264
"	"	732	96	264
"	"	733	97	264
"	"	734	98	264
"	"	735	99	264
"	"	744	115	243
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"	"	750	121	244, 250
"	"	751		244, 251
"	"	752	122	244, 256
"	"	753	123	244, 252
"	"	754	124	245, 256, 261
"	"	755	125	245
"	"	757	127	373
"	"	767	673	259
"	"	769	674	257, 258
"	"	770		259
"	"	771		259, 260
"	"	772		260
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"	"	956	787	265
"	"	1130	926	287

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Consolidated Rules	1897	1132	928	291
"	"	1184	960	294
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"	"	153		411
"	"	154		411
"	"	155		411



ADDENDA.

Page 44.—Instead of the paragraph beginning on second line from bottom of page: "But apart from express agreement etc." read as follows: "A mortgagee has a lien for moneys paid to redeem the mortgaged lands sold for taxes: *Wiley v. Ledyard* (1883) 10 P.R. 182. But a mortgagee who has been a party to a breach of trust in taking the mortgage has no lien for money paid by him for taxes on the mortgaged lands or for money paid to redeem them from a sale for taxes (a)."

Page 45.—In note (d) for "c. 184" read "c. 124."

Page 60.—In first line for "so at" read "as to."

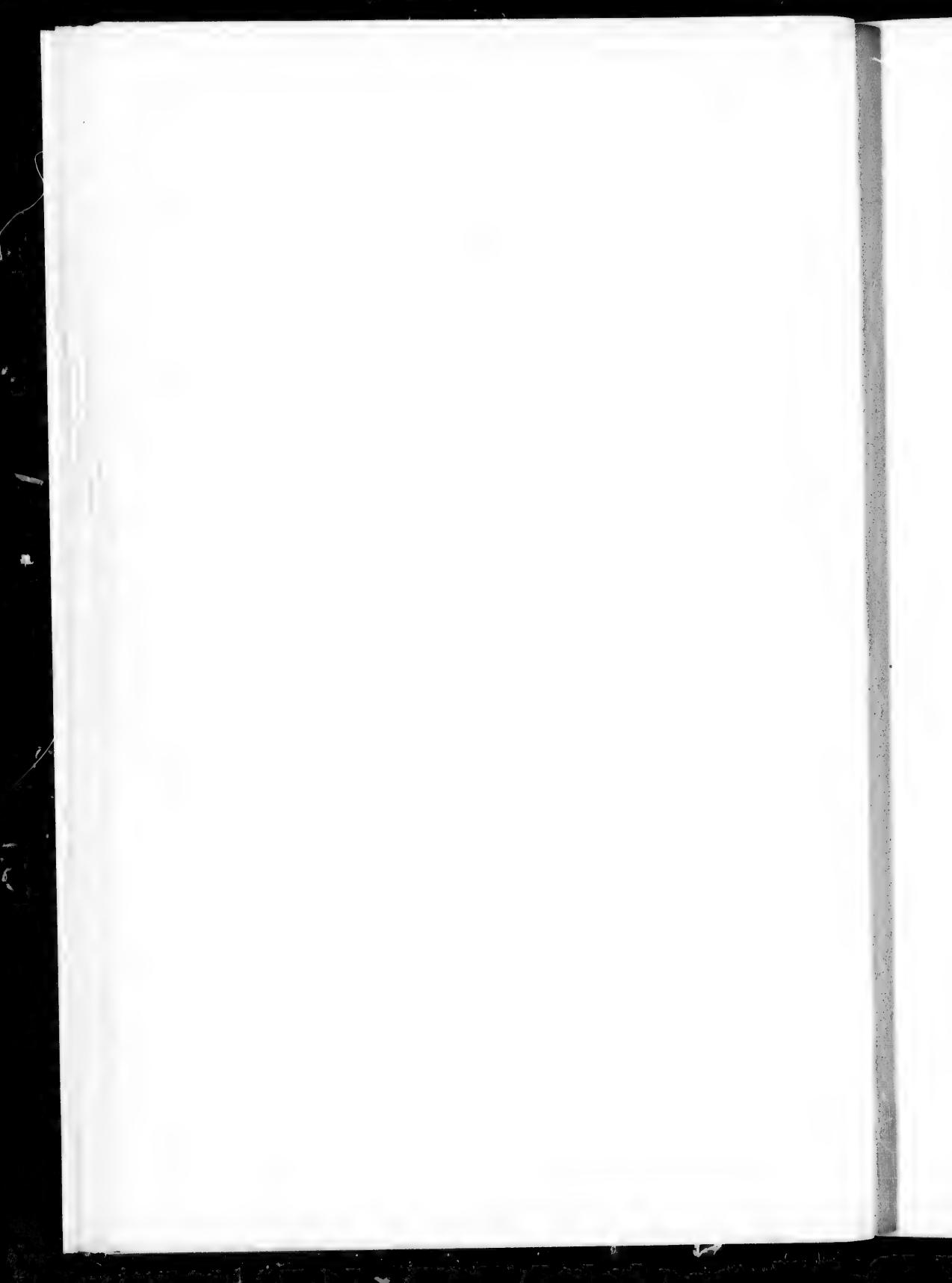
Page 74.—In fourteenth line after "repay the debt" add "unless he expressly covenants to do so."

Page 122.—In note (h) for "6 Mass." read "61 Mass."

Page 240.—In note (c) for "3 C.L.J." read "3 C.L.T."

Page 350.—In twelfth line for "against equity should relieve which" read "against which equity should relieve."

Page 428.—In note (b) for "1 C.C." read "1 B.C.C."



THE
LAW OF MORTGAGES
OF
REAL ESTATE.

PART I.

THE CONTRACT OF MORTGAGE.

CHAPTER I.

DEFINITION, NATURE AND INCIDENTS OF A MORTGAGE

i. *Definition.*

A mortgage is a security for the payment of money or money's worth.

A security for the payment of money, generally speaking, is anything that makes the money more assured in its payment or more readily recoverable than the mere right of action against the debtor for its recovery.

Thus a promissory note is a security ; besides the mere right of action for the debt it confers on the creditor certain rights which make the debt more readily recoverable ; for it is not necessary to prove the consideration, and the promissory note itself is evidence of the debt. And where another person, by signing or indorsing the note, becomes surety for the payment thereof, the creditor has a right of action against two persons instead of one, and his debt is thereby made more sure of payment. These are personal securities enforceable by personal action.

Instead of a personal security, or in addition thereto, the creditor may have the right to resort to the property Real security.

Mortgage a form of security.
Definition of security.

Personal security.

of the debtor to realize his claim. Such a security is called a real security or security *in rem*. Thus a pledge or pawn is a real security whereby actual or constructive delivery of a personal chattel is made to the creditor, the property therein remaining in the debtor ; a mortgage is a real security under which the property passes to the mortgagee.

Arising out
of contract.

Operation of
law.

Incidents of
securities.

Difference
between
mortgage
and other
real
securities.

These forms of security, it will be observed, all arise out of and are constituted by the agreement of the parties thereto. There are, however, certain forms of security which arise, not by agreement, but by operation of law. These are liens, such as a lien on land for unpaid purchase money, a lien on goods for the price of work and labour bestowed on them, or a statutory lien on property for labour or materials furnished.

The essential character of all forms of security *in rem* is the same. The creditor has a right to enforce the payment of his debt against the property which constitutes the security, or in certain cases to retain possession of the property until paid and to be paid his debt out of the property in priority to other creditors of the owner. The debtor has a right to redeem the property and have and enjoy it again on payment of the debt on the day fixed for payment, and under certain circumstances after that day.

The difference between a mortgage and other kinds of real securities lies in the quality and extent of the interest that the creditor has in the property of the debtor, and in the modes by which his rights may be enforced. Thus, under a mortgage the creditor has an absolute title to the property of the debtor ; while in the case of a pledge or lien the title to the property does not pass to the creditor. Upon default in payment under a mortgage the creditor at common law became the owner of the property and the debtor had no right of redemption. In equity, however, the mortgagor was entitled to redeem. But where the security was a pledge or lien the creditor, even at common law, did not become the absolute owner upon default in

payment. The relation of creditor and debtor was not essentially changed by the default; the debtor was still entitled to redeem, and the creditor's only right was to enforce his claim by sale. The creditor's rights have, however, been extended by statutory provision.

In equity the mortgagor was allowed to redeem after default on payment of the amount due. In this respect, if there are courts established exercising equitable jurisdiction, there is no practical difference between a mortgage and other forms of real security. But in the case of a mortgage the creditor may take possession of the property and receive the rents and profits thereof; or he may foreclose the debtor's right of redemption by process of law, and become the absolute owner; or he may have the property sold to realize his claim. A creditor holding only a pledge or lien has no right of foreclosure but only a right to sell.

A mortgage may be given of almost every description of real or personal property. It is proposed to deal in this work only with mortgages of real property.

A mortgage may be defined, for the purposes of this treatise and apart from statutory provisions, as a security on real property, arising out of contract, effected by an absolute conveyance or agreement to execute a conveyance of property which is charged with payment of a debt, redeemable at law only according to the strict conditions of the contract, but redeemable in equity independently of those conditions, and enforceable by foreclosure. There may be other remedies provided in the mortgage contract, such as distress, sale or action on the covenant for payment; but these are not distinctive of, or essential to, a mortgage.

An exceptional form of mortgage, rare in this country, is what is called a Welsh mortgage. This is a conveyance of an estate as security, redeemable at any time on payment of the principal without interest, the rents and profits of the estate until redemption being taken without account by the mortgagee in lieu of interest.

Right of
redemption
in equity.

Definition
of mortgage.

Welsh
mortgage.

Statutory
definitions.

Mortgage.

Mortgagor.

Mortgagee.

Property.

Land.

Conveyance.

Mortgage.

Mortgagor.

Mortgagee.

Incumbrance.

Incum-
brancer.

In Ontario the following definitions have been provided by the *Act respecting the Law and Transfer of Property* :—

“Mortgage” shall include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged, security for the repayment of money or money's worth, and when reconveyed, re-assigned or released on satisfaction of the debt.

“Mortgagor” shall include every person by whom a conveyance, assignment, pledge or charge as aforesaid is made.

“Mortgagee” shall include every person to whom or in favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred (e).

The following definitions are to be found in the *Act respecting Mortgages of Real Estate* :—

“Property” includes real and personal property, and any thing in action, and any other right or interest (d).

“Land” includes tenements and hereditaments, corporeal and incorporeal; and houses and other buildings; also an undivided interest in land (e).

“Conveyance” includes assignment, appointment, lease, mortgage, and other assurance and covenant to surrender, made on a sale, mortgage, demise, or settlement of any property, or other dealing with or for any property; and “convey” has a corresponding with that of conveyance (f).

“Mortgage” includes any charge on any property for money or money's worth; and “mortgage money” means money or money's worth, secured by a mortgage; and “mortgagor” any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his interest, or right, in the mortgaged property; and “mortgagee” includes any person from time to time deriving title under the mortgagee (g).

“Incumbrance” includes a mortgage in fee, or for a term, and a trust for securing money, and a lien, and a charge of annuity or other capital or annual sum; and “incumbrancer” a meaning corresponding with that of incumbrance, and every person entitled to the benefit of an incumbrance, or payment or discharge thereof (h).

An instrument securing a certain sum on land, to be repaid by annuities is a mortgage, and the mort-

(a) R.S.O. (1897) c. 119, s. 1, sub-s. 2.

(b) Sub-s. 3.

(c) Sub-s. 4.

(d) R.S.O. (1897) c. 121, s. 1, sub-s. 1.

(e) Sub-s. 2.

(f) Sub-s. 3.

(g) Sub-s. 4.

(h) Sub-s. 5.

OF MORTGAGE.

definitions have been pro-
the Law and Transfer of

ry instrument by virtue whereof
assigned, pledged or charged as
ey or money's worth, and to be
on satisfaction of the debt (a).

every person by whom any such
charge as aforesaid is made (b).

every person to whom or in whose
name, pledge or charge as afore-

are to be found in the *Act
Estate* :—

personal property, and any debt,
her right or interest (d).

and hereditaments, corporeal or
buildings; also an undivided share

ment, appointment, lease, settle-
ment to surrender, made by deed,
lement of any property, or on any
erty; and "convey" has a meaning
nee (f).

arge on any property for securing
mortgage money" means money or
tgage; and "mortgagor" includes
ing title under the original mortga-
gote, according to his estate,
ged property; and "mortgagee"
one deriving title under the original

ortgage in fee, or for a less estate,
nd a lien, and a charge of a portion,
l sum; and "incumbrance" has
at of incumbrance, and includes
t of an incumbrance, or to require

a certain sum on land to be
ortgage, and the mortgagee is

sub-s. 2.

sub-s. 1.

DEFINITION, NATURE AND INCIDENTS.

entitled to seek foreclosure, although he has a power of
sale (j).

A mortgage is a contract of security and a conveyance Contract
of property constituting the security. The contract is conveya-
usually contained in the instrument of conveyance, but this
is not essential. The conveyance may be absolute in form
and the proviso for redemption may be contained in a
separate instrument, or it may be merely verbal.

The conveyance may be absolute in form and yet be a
mortgage (k), and the absence of a proviso for redemption
will not prevent its being a mortgage (l). It cannot be a
mortgage on one side only; the rights of the parties must
be reciprocal and mutual.

The question whether a transaction is an absolute sale
of the property or a mortgage depends on the intention of
the parties. In determining the real intention the subse-
quent conduct of the parties and the collateral circumstances
may be considered, and parol evidence is admissible to show
that an absolute conveyance was intended to be a mortgage
only (m). Thus a deed made to a party advancing money
to carry out the purchase of the land is of the nature of a
mortgage (n). And so the payment of interest, or the
inadequacy of the purchase price, will raise a presumption
that the transaction was intended to be a mortgage (o).

On the other hand if there be no covenant for payment,
or if the grantee take possession and continue therein as
ostensible owner, that inference will be rebutted (p).

But to induce a court to declare a deed absolute on its
face to have been intended as a mortgage only, the

(j) *Credit Foncier v. Andrew* (1893) 9 Man. L.R. 65.

(k) *Barnhart v. Greenshields* (1853) 9 Moo. P.C. 18.

(l) *Bell v. Carter* (1853) 17 Beau. 11.

(m) *Barton v. Bank of New South Wales* (1890) 15 App. Cas. 379.

(n) *Robinson v. Chisholm* (1894) 27 N.S.R. 74.

(o) *Allenby v. Dalton* (1835) 5 L.J.K.B. 312; *Bullen v. Renwick* (1862) 9 Gr. 202.

(p) *Williams v. Owen* (1840) 5 My. & Cr. 303; *Alderson v. White* (1858) 2 Deg. & J. 97; *Healey v. Daniels* (1868) 14 Gr. 633.

evidence of such intention must be of the clearest, most conclusive and unquestionable character (*q*).

Sale and
re-purchase.

In case of a transaction in the form of a sale, coupled with a right of re-purchase, the real intention of the parties determines whether it is a mortgage or not. If the real intention of the parties be that there shall be an absolute sale, subject to the right to re-purchase the estate within a specified time, at a fixed price, the parties will be held to their bargain. But if the real intention is that the property should be conveyed as a security only, the transaction will be deemed to be a mortgage (*r*).

Form and
effect.

A mortgage is created by a conveyance or an agreement, express or implied, to execute a conveyance of the property, and its effect is to charge on the mortgaged property the moneys advanced. It is usual to insert in the mortgage deed a covenant for payment of principal and interest. This renders the mortgagee a specialty creditor; but such a covenant is not a necessary part of the mortgage security. If there be no covenant for payment, the debt is a simple contract debt; for the mortgage, even although under seal, does not imply a debt by specialty. The absence of a covenant for payment does not affect the mortgagor's right of redemption.

Right of
redemption.

The right of redemption is an essential and inseparable attribute of every mortgage. But the right was regarded differently by courts of common law and courts of equity. At common law the mortgagor had a right to redeem according to the strict terms of the mortgage contract; that is, by payment of the mortgage money on the day appointed for payment. If the mortgagor failed to make payment on the day fixed, his right to redeem was lost and

(*q*) *McMielen v. Ontario Bank* (1892) 20 S.C.R. 548.

(*r*) *Fink v. Patterson* (1860) 8 Gr. 417; *Cayley v. McDonald* (1868) 14 Gr. 540; *Blunt v. Marsh* (1888) 1 N.W.T.R. 55; *Hawke v. Milliken* (1866) 12 Gr. 236; *Rapson v. Hersee* (1869) 16 Gr. 685.

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his estate was forfeited to the mortgagee, who became absolute owner thereof. Courts of law enforced the mortgage contract strictly, and refused to alter or modify its terms in favour of the mortgagor, however inequitable the terms might be.

The mortgagor's right to redeem after default was the creation of courts of equity. In England courts of equity early began to moderate the severity with which the common law treated the breach of the condition. And while courts of equity refused to alter the legal effect of the forfeiture, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem* declared it to be unjust that the mortgagee should retain for his own benefit what was intended as a security. Equity viewed the breach of condition as being in the nature of a penalty and held that the mortgagor had an equity to redeem notwithstanding the forfeiture.

Prior to the establishment in 1837 of the Court of Chancery in Upper Canada (s) legal mortgages alone were known in that province. The mortgage was an absolute assurance, subject to the condition that upon payment of the debt at a time certain the assurance should be void. On payment of the debt at the time fixed the mortgagor became entitled to a reconveyance. In default of payment the estate of the mortgagee became absolute and irredeemable. The only protection afforded the mortgagor after default was by the Imperial Statute 7 Geo. 2, c. 20, which provided that where an action should be brought on any bond (which included covenant (*t*)) for payment of a mortgage debt or performance of the covenants, or where an action of ejectment should be brought by a mortgagee for recovery of the mortgaged premises, if the person having right to redeem should, pending such action, pay all principal moneys, interest and costs, the mortgagee

Redemption
in equity.

Redemption
in Upper
Canada.

(s) 7 Will. 4, c. 2.

(t) *Dixon v. Wigram* (1832) 2 Cr. & J. 613; *Smeeton v. Collier* (1847) 1 Exch. 457.

was obliged to accept such moneys in full satisfaction and discharge of the mortgage. This relief, however, was not open to a mortgagor out of possession, and further was not available in cases in which there were accounts to be investigated and disputed payments (*u*).

Mortgagor cannot divest himself of the right to redeem.

In order firmly to establish the mortgagor's right to redeem, it was necessary to lay down a further rule that the mortgagor could not, by any agreement entered into at the time of the loan, divest himself of his right to redeem. That rule is expressed in the well-known maxim, "Once a mortgage always a mortgage" (*v*).

Fettering redemption.

Every stipulation, moreover, which has the effect of fettering the right to redeem, such as restricting it to a limited period of time, or confining the right to a particular person or class, will be rejected (*w*).

Agreement to purchase.

So the mortgagee will not be allowed at the time of the loan to enter into a contract with the mortgagor for the purchase of the lands at a fixed price in case of default in payment (*x*). But an agreement made after the making of the mortgage, if entered into in good faith, for the purchase of the equity of redemption by the mortgagee is not within the rule, even although the purchase price is made up of the principal, interest and costs.

Collateral advantage.

A mortgagee will not be allowed to take advantage of the necessities of the mortgagor so as to obtain a collateral or additional advantage beyond the payment of the mortgage moneys. As expressed by the Master of the Rolls in *Jennings v. Ward* (*y*) :—

"A man shall not have interest for his money and a collateral advantage besides for the loan of it, or else the redemption with any by-agreement."

But a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided

(*u*) *Simpson v. Smyth* (1846) 1 E. & A. 9, 172.

(*v*) *Howard v. Harris* (1683) 1 Vern. 33, 190; 18 R.C. 358.

(*w*) *Mellor v. Lees* (1742) 2 Atk. 494.

(*x*) *Fallon v. Keenan* (1866) 12 Gr. 388.

(*y*) (1705) 2 Vern. 520; 18 R.C. 365.

the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing or undue influence.

Thus, where a mortgage of an hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquor sold on the mortgaged premises, it was held that as the covenant entered into by the parties for the purchase and supply of beer during the continuance of the security was a reasonable one, which did not in any way clog the redemption or give the mortgagee any undue advantage, it ought to be enforced by injunction (z).

The existence of a mortgage implies the right of foreclosure. The right of foreclosure is correlative and reciprocal to the right of redemption (a).

Every mortgage imports a right of foreclosure. This will be evident from a consideration of the principles upon which equity decrees redemption. At common law the mortgage upon default became absolute, and in accordance with its strict terms the mortgagor was then foreclosed. Courts of equity, however, interfered for the purpose of giving the mortgagor an opportunity to redeem after default. But if the mortgagor failed to redeem at the time appointed by the court of equity, the foreclosure which would have followed at law was then allowed to take effect.

Foreclosure
at common
law.

Foreclosure, therefore, is a necessary incident of every mortgage. Formerly the mortgagee's only remedy was foreclosure; but it is now well settled that the mortgagee is entitled to bring action for sale, even although the mortgage deed does not contain a power of sale.

(z) *Biggs v. Hoddinott* [1898] 2 Ch. 307; *Jennings v. Ward* (1705) 2 Vern. 520 explained and distinguished; *Mainland v. Upjohn* (1889) 41 Ch. D. 126 discussed and applied; see also *Santley v. Wilde* [1899] 1 Ch. 747; reversed on appeal (1899) W.N. 132.

(a) *Sauler v. Worley* [1894] 2 Ch. 170.

CHAPTER II.

KINDS OF MORTGAGE.

SECTION I.

LEGAL MORTGAGES.

Mortgages may be either legal or equitable. To effect a legal mortgage, the legal estate in the property is conveyed to the mortgagee subject to the mortgagor's right to redeem. It is not necessary that the conveyance be in the form of a mortgage; it may be absolute in form; provided it conveys the legal estate it will be sufficient to create a legal mortgage.

A legal mortgage in fee simple of freehold lands may be regarded as the normal type of a mortgage security. It is advisable to employ the appropriate word of conveyance, as for example "grant" where the mortgage is of freehold lands. But the use of technical words is no longer essential. By the *Act respecting the Law and Transfer of Property* (*a*) the word "convey" will effect a valid and sufficient assurance by way of mortgage. By the same act it is no longer necessary in the limitation of an estate in fee simple to use the word "heirs." It will be sufficient to use the words "in fee simple" or any other words sufficiently indicating the limitation intended (*b*).

But a conveyance intended to operate as a transfer of the legal estate is required to be under seal (*c*).

Under the *Land Titles Act* (*d*), however, a registered owner may charge his land with the payment of money

(*a*) R.S.O. (1897) c. 119, s. 1.

(*b*) s. 4.

(*c*) s. 3.

(*d*) R.S.O. (1897) c. 138, s. 33. See Form No. 28 to the Act.

by instrument without seal ; and by section 37 the owner of a registered charge may enforce it by foreclosure or sale of the land in the same way as if the land had been transferred to him by way of mortgage.

In the Northwest Territories, under the *Land Titles Act, 1894* (e), a mortgage may be created by an instrument not under seal, simply charging the land with the payment of money. Such a mortgage does not operate as a transfer of the land but only as a security, and after default the mortgagee may sell or foreclose.

A mortgage of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised belonging or in anywise appertaining or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof ; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder or remainders, yearly and other rents, issues and profits of the same lands and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever of the grantor, in, to, out of or upon the same lands and every part and parcel thereof, with their and every of their appurtenances (f).

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form except that immediately after the printed covenant for payment the following words were inserted in writing, "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unerased in its usual place after the

What passes
under a
mortgage
of land.

Written
covenant
controls
printed
covenant.

(e) 57-58 Viet. (D.) (1894) c. 28, s. 73.
(f) R.S.O. (1897) c. 119, s. 12.

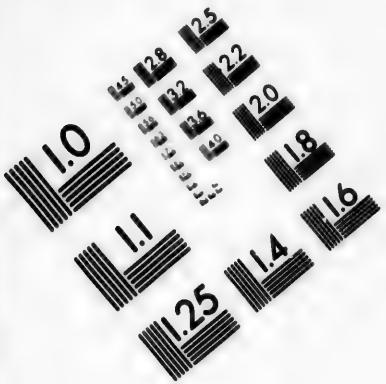
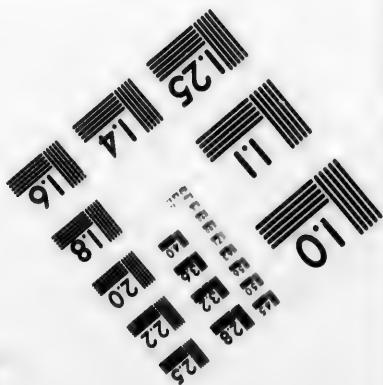
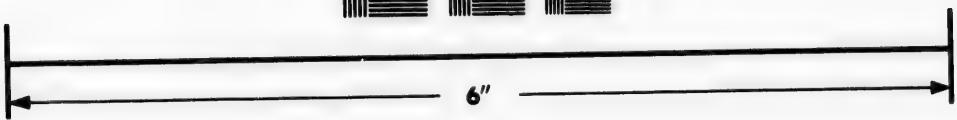
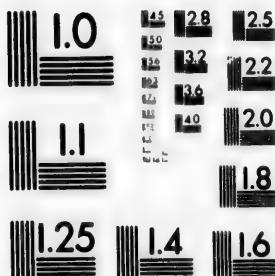


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covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for wrongful distress. It was held that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed and because it was in writing, and the words super-added in writing were entitled to have greater effect attributed to them than the printed clauses (g).

An incorporated company having executed a bond, which though it contained no direct words of charge was evidently intended to give a lien on the property of the company, it was held that the lien was sufficiently created (h).

A deed poll to secure a sum of money, in which the words were "mortgage all that certain parcel of land &c., to have and to hold the aforesaid land unto the said J. R., his heirs, executors, administrators and assigns," was held sufficient to pass the right of possession to the grantee (i).

In an instrument under seal the words "and for securing &c., the said P.P. doth hereby specially bind, oblige, mortgage and hypothecate the said piece or parcel of land, &c." pass no interest; they only shew an intention to create a charge or lien (j).

Implied covenants.

Under section 5 of the *Act respecting Mortgages of Real Estate*, R.S.O. (1897) c. 121, there shall be deemed to be included and implied in every conveyance by way of mortgage, the following covenants by the person who conveys and is expressed to convey as beneficial owner, namely :—

(1) For payment of the mortgage money and interest and observance in other respects of the provisions in the mortgage.

(g) *McKay v. Howard* (1883) 6 Ont. 135.

(h) *The Town of Dundas v. The Desjardins Canal Co.* (1870) 17 Gr. 27.

(i) *Vandelinder v. Vandelinder* (1864) 14 U.C.C.P. 129.

(j) *Doe d. Ross v. Papst* (1853) 8 U.C.R. 574.

- (2) Good title.
- (3) Right to convey.
- (4) That on default the mortgagee shall have quiet possession of the land.
- (5) Free from all incumbrances.
- (6) That the mortgagor will execute such further assurances of the said lands as may be requisite.
- (7) That the mortgagor has done no act to incumber the land mortgaged.

These covenants are according to the tenor and effect of the several and respective forms of covenants set forth in Schedule B to the *Act respecting Short Forms of Mortgages* (k).

In a conveyance by way of mortgage of leasehold property the following further covenant by the person who conveys and is expressed to convey as beneficial owner is implied, namely:—"That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed, and is in full force, unforfeited and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance.

"And also that the person so conveying, or the persons deriving title under him, will at all times as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements, contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made,

(k) R.S.O. (1897) c. 126.

Leasehold
mortgages.

and those deriving titles under him, indemnified against all accidents, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them" (*kk*).

**Covenants
joint and
several.**

In a mortgage where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenants on their part shall be deemed to be joint and several covenants by them; and where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums; in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him (*l*).

The foregoing provisions apply only to mortgages made after the 1st day of July, 1886.

**Implied
covenant
to repair.**

In the Northwest Territories in every mortgage there shall be implied against the mortgagor remaining in possession a covenant that he will repair and keep in repair all buildings or other improvements erected and made upon the land, and that the mortgagee may at all convenient times, until the mortgage is redeemed, be at liberty, with or without surveyors or others, to enter into or upon the land to view and inspect the state of repair of the buildings or improvements (*m*).

**Express
covenant.**

An express covenant in a mortgage overrides and excludes an implied covenant (*n*).

(*kk*) R.S.O. (1897) c. 121, s. 5.

(*l*) R.S.O. (1897) c. 121, s. 6.

(*m*) 57-58 Viet. (D.) (1894) c. 28, s. 85.

(*n*) *Rithet v. Bearen* (1897) 5 B.C.R. 457.

SECTION II.

EQUITABLE MORTGAGES.

An equitable mortgage does not pass the legal estate to the mortgagee but operates by way of equitable transfer. It may be effected by a mortgage in the ordinary form where the legal estate has already been conveyed by a prior mortgage; or it may be created by an agreement to give a legal mortgage.

i. *Mortgage of the Equity of Redemption.*

At common law only one form of mortgage was recognized, namely, a mortgage conveying the legal estate. When the owner had conveyed the legal estate to the mortgagee there was according to common law doctrine no further estate to convey, and accordingly a second mortgage had at law no effect whatever as a conveyance of the lands. Courts of equity in earlier times regarded the interest which a mortgagor still retained in the mortgaged lands as being merely a right or equity to redeem; but these courts afterwards came to regard that interest as an estate which might descend to the mortgagor's heirs, or which might be sold or otherwise dealt with until it should be actually foreclosed by a decree of a court of equity (*o*). Equity looked at the substance of the transaction and established the rule that the person entitled to the equity of redemption is in equity the owner of the property and possessed of it in right of his original estate (*p*). So also a subsequent mortgage, although of no effect at law, operated as a mortgage of the mortgagor's estate or equity of redemption *toties quoties* and was called an equitable mortgage because, while not recognized at law, it was

(*o*) *Casborne v. Scarfe* (1737) 1 Atk. 603; 18 R.C. 369.

(*p*) *Heath v. Pugh* (1881) 6 Q.B.D. 345; *Turn v. Turner* (1888) 30 Ch. D. 456.

regarded in equity as a mortgage and was enforced by courts exercising equitable jurisdiction.

ii. *Agreement to give a mortgage.*

An agreement to give a legal mortgage was looked upon in equity as an equitable mortgage on the principle that equity regards that as done which ought to be done. So an agreement, however informal, by which any property is made a security for a debt or a present advance creates an immediate charge on such property, and amounts to an equitable mortgage (*q*).

Statute of
Frauds.

Such an agreement in the case of lands must be in writing duly signed by the party to be charged, in order to satisfy the *Statute of Frauds* (*r*). Section 4 of that statute provides as follows :—

"No action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

An immediate charge on property has been held to be created by a power of attorney to receive rents and profits of land until repayment of a loan (*s*) ; by a deed appointing a receiver of rents and profits to secure an annuity (*t*) ; by a letter that money intended to be invested at interest on a mortgage of certain lands was in the hands of the writer who was interested in those lands (*u*).

And so a letter in the following form, "I agree to charge the east half of lot number 19 with the payment of the two mortgages amounting to \$750 and I agree on demand to execute proper mortgages of said land to carry out this agreement or to

(*q*) *Tebb v. Hodge* (1869) L.R. 5 C.P. 73; *Matthews v. Cartwright* (1742) 2 Atk. 347; *Burn v. Burn* (1798) 3 Ves. 573.

(*r*) 29 Car. II. c. 3.

(*s*) *Spooner v. Sandilands* (1842) 1 Y. & C. (C.C.) 390; *Abbott v. Stratton* (1846) 3 J. & L. 603.

(*t*) *Cradock v. Scottish Provident Institute* (1894) 63 L.J. Ch. 15; 70 L.T. 718.

(*u*) *Re Crowdys, Burges v. Crowdys* (1882) 46 L.T. 71.

pay off the said mortgage" is not a mere executory agreement, but operates as a present charge in favour of the mortgagees upon the lands described, and may be registered against them (*v*).

An instrument intended to operate as a legal mortgage but which fails for want of some formality is valid as an equitable charge, and gives the mortgagee a right to a perfected assurance (*w*). Informality
in legal
mortgage.

And where the equitable owner of property had it conveyed to his son, a minor, in trust for himself, and he afterwards signed the son's name to a mortgage of the property to a creditor, and added his own name as witness, it was held that the instrument, though void at law, created a valid charge in equity (*x*).

The agreement need not specifically describe the property if it is otherwise sufficiently ascertained or ascertainable (*y*); and the charge created by the agreement may extend to after acquired lands (*z*).

In *Re Kelcey, Tyson v. Kelcey* (*a*) the applicant claimed to be a secured creditor under a memorandum of the 10th of November, 1869, signed by the testator, by which he charged "all my real and personal estate whatsoever and wheresoever and of what nature or kind soever the same may be or consist" with the payment to the applicant of a sum of £2,500 that day advanced, together with interest on the same, and undertook and agreed, when required, to make and execute all such deeds and assurances as should be reasonable and necessary for charging the said premises with or further securing the repayment of the said sum and interest. The debt was reduced to £500 in the testator's lifetime, and all interest was paid up to the 1st of September, 1897. At the date of the above memor-

A general charge of property is valid if the subject matter is ascertained when the court is asked to enforce it.

- (*v*) *Hoofstetter v. Booker* (1895) 22 Ont. App. 175; 26 S.C.R. 41.
- (*w*) *Mestaer v. Gillespie* (1805) 11 Ves. 621; 8 R.R. 261.
- (*x*) *Dennistoun v. Fyfe* (1865) 11 Gr. 372.
- (*y*) *Smith v. Smith* (1835) 1 Y & C. Ex. 338.
- (*z*) *Metcalfe v. Archbishop of York* (1836) 1 My. & Cr. 547.
- (*a*) (1899) W.N. 133.

andum the testator was entitled to a policy for £1,000 on his life. Shortly after the testator's death in 1898 notice of the above memorandum was given to the assurance company on behalf of the applicant. The policy was otherwise unincumbered, and the amount now due on it was £1,214. It had not been paid owing to the applicant's notice. On the 10th of April, 1899, the applicant took out a summons, asking that the administrator *cum testamento annexo* might be ordered to pay her claim out of moneys coming to his hands as such administrator. It was argued in opposition to the application that the memorandum did not create a specific lien of any sort or kind (*b*) and that it was not only too vague and indefinite to be enforced, but as it included every item of the mortgagor's property, preventing him paying his debts, and depriving him of the means of subsistence, it was against public policy to enforce it (*c*). It was held that a person can specifically charge every item of his real and personal property, although no doubt as to chattels personal it would be necessary to register the document as a bill of sale. What he may do in one way he may do in another, as far as public policy is concerned. With regard to vagueness it is quite sufficient if the subject matter is ascertained when the court is asked to enforce the contract.

Intention.

The intention of the parties as to the terms and extent of the security may be established by parol evidence (*d*); and parol evidence is also admissible to prove acts of part performance, so as to exclude the operation of the *Statute of Frauds* (*e*); but the mere payment by the lender of the amount agreed to be lent on the security of the land is not a sufficient part performance to take it out of the statute (*f*).

(*b*) *Tailby v. Official Receiver* (1888) 13 App. Cas. 523, 544.

(*c*) *In re Clarke, Coombe v. Carter* (1887) 36 Ch. D. 348, 352, 355.

(*d*) *Banks v. Whittal* (1847) 1 DeG. & S. 536.

(*e*) *Maddison v. Alderson* (1883) 8 App. Cas. 467.

(*f*) *Ex parte Hooper* (1815) 19 Ves. 477; *Ex parte Hall, In re Whitting* (1879) 10 Ch. D. 615.

An agreement to borrow or lend money on mortgage Agreement to borrow or lend.
will not be enforced by specific performance so long as it remains executory and neither party to it performs any of its terms. The remedy, if any, is in damages (g).

But an agreement to give security for a past debt in consideration of forbearance or for a present actual advance will be enforced by specific performance (h). So also where only part of the amount agreed has been advanced (i).

Where an agreement for a mortgage contains a stipulation that the intended mortgage shall contain the usual clauses, a personal covenant for payment of principal and interest will be inserted by the court; also a power of sale unless it be implied by statute (j). If the agreement is under seal the power of sale may be exercised before the formal mortgage is executed (k).

iii. *Equitable Mortgage by Deposit of Title Deeds.*

To the rule that an agreement for a mortgage or creating a charge on lands must be in writing, there is an important exception. A deposit of title deeds by the owner of lands with his creditor as security for a debt or loan operates, even although there is no note in writing of the transaction, as an equitable mortgage, conferring on the creditor not only the right to hold the deeds until his debt is paid but also an equitable interest in the land itself. A delivery of the deeds without even a verbal agreement will have this effect if the relation of debtor and creditor exists between the parties, and the delivery is in itself evidence of an agreement for a mortgage, and will

(g) *Rogers v. Challis* (1859) 27 Beav. 175; *Sichel v. Mosenthal* (1862) 30 Beav. 371; *Larios v. Bouany y Guerty* (1873) L.R. 5 P.C. 346.

(h) *Alliance Bank v. Broom* (1862) 2 Dr. & Sm. 289; *Ex parte Jones* (1835) 4 D. & C. 750.

(i) *Hunter v. Lord Langford* (1828) 2 Moll. 272.

(j) *Saunders v. Milsome* (1866) L.R. 2 Eq. 573; *Cockburn v. Edwards* (1881) 18 Ch. D. 449.

(k) *Re Solomon and Meagher's Contract* (1889) 40 Ch. D. 508.

be a sufficient part performance to exclude the operation of the *Statute of Frauds* (*l*).

**Agreement
to deposit
title deeds.**

But a verbal agreement for a deposit not accompanied by an actual deposit is invalid under the statute (*m*). Where there is a written agreement for a deposit of deeds as security it will be a good charge although no deeds have been actually deposited; or even although some of the deeds have not been executed (*n*).

A mortgagee by deposit of title deeds may enforce the completion of the security by requiring a legal conveyance from his debtor; and he will be entitled to foreclosure (*o*).

**Equitable
mortgagee
entitled to
sale.**

An equitable mortgagee by deposit of title deeds with or without any memorandum of charge or agreement to execute a legal mortgage, or the holder of any other equitable mortgage or charge may obtain an order for sale (*p*).

**May restrain
mortgagor
from
transferring
legal estate.**

An equitable mortgagee who commences an action for foreclosure may obtain an injunction restraining the owner from parting with the legal estate (*r*).

(*l*) *Russell v. Russell* (1783) 1 Brown Ch. Cas. 269; 18 R.C. 26; *Burgess v. Moron* (1856) 2 Jur. (N.S.) 1059.

(*m*) *Ex parte Hooper* (1815) 1 Mer. 7; 19 Ves. 477; *Ex parte Coombe* (1819) 4 Madd. 249; 20 R.R. 294.

(*n*) *Ex parte the Sheffield Union Banking Co. re Carter* (1865) 13 L.T. (N.S.) 477; *Ex parte Orrett* (1837) 3 M. & A. 153.

(*o*) *Ex parte Wright* (1812) 19 Ves. 255; *James v. James* (1873) L.R. 16 Eq. 153.

(*p*) *York Union Banking Co. v. Artley* (1879) 11 Ch. D. 205; *Grissell v. Money* (1869) 38 L.J. Ch. 312; *Cripps v. Wood* (1882) 51 L.J. Ch. 584; *Kerr v. Bebee* (1866) 12 Gr. 204.

(*r*) *London and County Banking Co. v. Lewis* (1882) 21 Ch. D. 490.

CHAPTER III.

SPECIAL KINDS OF MORTGAGE.

SECTION I.

MORTGAGE OF LEASEHOLD.

A mortgage of leasehold may be created either by How created. assignment of the whole unexpired residue of the term or by sub-lease.

If the mortgage is by way of assignment of all the remaining interest in the term, the mortgagee is liable to the lessor for the rent and for the performance of the covenants in the original lease, until he assigns over, even although he does not take actual possession of the demised lands (a).

Liability of
mortgagee
by
assignment.

And a mortgagee of a lease cannot, by offering to forego his security, escape liability for breaches of covenants occurring during the time he is assignee (b).

"It is now well settled that a mortgagee of a term, where the whole term has been assigned to him, is liable on the covenants contained in the lease to the same extent as a purchaser of the term would be. It is also clear that the assignee of a term, in the absence of a covenant against assignment by which he is bound, may relieve himself from liability for future breaches of covenant by assigning it to any other person, even to a pauper: *Spencer's Case*, 1 Sm. L.C., 10th ed. at p. 70; *Woodfall's Landlord & Tenant*, 16th ed. p. 269 *et seq.*, and cases there cited" (c).

A mortgagee by way of sub-lease is not liable to pay the rent or perform the covenants of the lease, there being no privity of estate between the mortgagee and the

Liability of
mortgagee
by way of
sub-lease.

(a) *Stone v. Evans* (1806) 7 East 341; 2 Peake, Ad. Ca. 94; *Williams v. Bosanquet* (1819) 1 Brod. & B. 238; *Westerell v. Dale* (1797) 7 T.R. 306; *Burton v. Barclay* (1831) 7 Bing. 745; *Platt's Law of Covenants* 488.

(b) *Jamieson v. London and Canadian Loan and Agency Co.* (No. 2) (1899) 26 Ont. App. 116 at p. 132; affirmed by Supreme Court 24th Oct., 1899.

(c) *Jamieson v. London and Canadian Loan and Agency Co.* (No. 2) (1899) 26 Ont. App. 116 at p. 124; affirmed by Supreme Court 24th Oct., 1899.

original lessor. But where a reversion is left in the mortgagor, the lease may be forfeited by non-observance or non-performance by the mortgagor of the covenants or conditions in the lease.

What is an assignment of lease.

In *Jamieson v. The London and Canadian Loan and Agency Co.* (*d*) the question what constitutes an absolute assignment of a lease as distinguished from a sub-lease was much discussed.

The lease in that case was for a term of twenty-one years, with a covenant on the part of the lessor to grant to the lessee, his executors, administrators or assigns, upon the expiration of that term, a renewal lease for a further term of twenty-one years. The lessee mortgaged the lease to the defendant company, the material parts of the mortgage deed being as follows:—

Recital.

Whereas by indenture of lease bearing date the first day of January, 1889, and made between Philip Jamieson, of the said city of Toronto, merchant, as lessor, and the said mortgagor as lessee, the said Philip Jamieson demised unto the said mortgagor, his executors, administrators and assigns, the lands hereinafter mentioned, for the term of twenty-one years from the first day of January, 1889, subject to the rents, covenants and conditions therein reserved and contained, and with the rights of renewal therein contained.

Premises.

Now, therefore, this indenture witnesseth that in consideration of four thousand dollars of lawful money of Canada now paid by the said mortgagees to the said mortgagor (the receipt of which is hereby acknowledged), the said mortgagor doth grant and mortgage unto the said mortgagees, their successors and assigns forever, all and singular the said indenture of lease and the benefit of all covenants and agreements therein contained, and all that certain parcel or tract of land and premises situate lying and being in the city of Toronto, in the county of York, being composed of lots numbers five and six on the south side of Queen street, according to registered plan 14, together with all and singular the engines and boilers which now are, or shall at any time hereafter be brought upon and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of said leasehold premises hereby granted and mortgaged or intended so to be, and be and form part of the term hereby granted and mortgaged.

Habendum.

To have and to hold unto the said mortgagees, their successors and assigns for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interest of him, the said mortgagor, or which he may hereafter acquire therein. Together with all the outhouses, outbuildings, easements and appurtenances thereto belonging or now in anywise used or enjoyed in connection with the said premises by the said mortgagor.

(*d*) (1897) 27 S.C.R. 435, reversing the judgment of the Court of Appeal, 23 Ont. App. 602.

The Supreme Court reversing the judgment of the Court of Appeal and restoring that of Robertson J. held that the mortgage effected an absolute assignment of the lease, and that the mortgagees were therefore liable for the payment of the rent and the performance of the covenants of the lease.

The judgment of the Supreme Court was based upon two grounds:—

(1) The premises of the mortgage deed upon a proper interpretation contained an express assignment of the whole term, and if the *habendum* reserved a reversion of one day to the mortgagor the *habendum* was inconsistent with the premises and therefore void for repugnancy.

(2) The *habendum* did not reserve a reversion to the mortgagor. The Court said:—

"If we are to construe the words 'less one day thereof' as meaning the last day of the term, as we necessarily must do if we are to give effect to the respondent's proposition that there was a reservation of a reversion, we bring these words into direct conflict with other terms of the *habendum* and thus introduce that repugnancy which must be fatal to it. This is apparent in two respects. The *habendum* expressly includes 'all renewals and substituted estates and rights of renewal, and other interests of him, the said mortgagor, which he may hereafter acquire therein.'

"Now, in the first place, if we turn to the renewal clause in the lease above set forth, we find that no right of renewal is to arise until the expiration of the lease, so that if we are to consider the last day of the term as reserved to the mortgagor the right of renewal, as between the lessor and the lessee and those claiming under the latter, would be in the lessee himself and not in his mortgagees. This shews conclusively, in my opinion, that it was intended by this part of the *habendum* that the mortgagees should have the whole term in them including the last day, an interpretation essential to qualify them to exercise the right of renewal. This is strengthened by the second and other argument drawn from the words 'and other interests of him the said mortgagor' which are utterly inconsistent with the retention by the latter of a reversion. In order to avoid this repugnancy we must, therefore, construe the reservation of a day generally (without saying the last day of the term), as meaning the first day after the execution of the mortgage. Preston (e), as high an authority as any which could be quoted on such a point has this passage:

"In order that an instrument may operate as an under-lease, a reversion must be retained by the former owner, and consequently the under-lease must be for a period less in point of time than the term or estate of the lessor, or when the grant is for the residue of the term of the grantor, there must be an exception of the last day or

the last hour, or of some other period of the term. This exception as well as a grant made for part only of the period during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate for an instrument may, it should seem, operate as an assignment notwithstanding it reserves a portion of the estate, being the first part of it, as in the case of an assignment to hold from a day to come or from an event to happen unless it is to happen after the death of a person by express limitation.'

"Thus it will be seen that even as regards an *habendum* which contains no terms inconsistent with a day generally reserved being construed as the last day of the term, Preston considers such a general reservation insufficient to give the character of a sub-lease. Then *a fortiori* must this be so if to construe such a general reservation would make the *habendum* itself irreconcilable with the express provisions to be found (as in the present case) in the *habendum* clause itself."

"Again the same writer (Preston) says (*f*):—

"After the under-lease is made by a term for years the grantor has in point of estate not merely and simply the residue of the time of his original term; he has the same measure of time, duration of interest and estate as he had prior to the under-lease subject only to that lease. The sole effect of the under-lease is to confer a right to the possession or other beneficial enjoyment during the term granted by the under-lease; and the lessor in the under-lease retains by way of seigniory or reversion his original ownership, subject only to the right conferred by the under-lease."

"This is undoubtedly a correct definition of the estates and relative rights in the term of a lessee and under-lessee. Then how can it possibly be said that an *habendum* which grants, as the present *habendum* does, all the interests of the lessee as well as those he may subsequently acquire, is susceptible, consistently with Preston's definition, of being construed as creating not an assignment, but a mere under-lease?"

Assignee of
lease cannot
re-assign
without
leave.

Where the original lease contains a covenant not to assign or sub-let without leave and the lease has been assigned with the consent of the lessor it cannot be re-assigned to the original lessee without the lessor's consent. The long form of the covenant not to assign or sub-let without leave in the *Act respecting Short Forms of Leases* (*g*), provides that the lessee and his assigns shall not during the term assign the premises unto any "person or persons whomsoever" without the consent of the lessor, and these words include the original lessee (*h*).

But where
lessor has
consented to
mortgage
mortgagee
may
discharge it

In *Jamieson v. London and Canadian Loan and Agency Co.* (*No. 2*) (*i*), it was held that the defendants,

(*f*) 2 Conv. 125.

(*g*) R.S.O. (1897) c. 125 Schedule B. (7).

(*h*) *Munro v. Waller* (1896) 28 Ont. 29.

(*i*) (1899) 26 Ont. App. 116; affirmed by Supreme Court, 24th Oct., 1899.

mortgagees of a lease, were entitled to get rid of liability on the lease by executing a statutory discharge of the mortgage, to which at the time of its execution the lessor had consented. It was contended that this was in fact assigning the lease without the consent of the lessor in contravention of the covenant in the lease not to assign or sub-let without leave. But MacLennan, J. A. said :—

"If the plaintiff's consent to the mortgage extends to all the express stipulations therein contained, it must equally extend to all those rights and obligations of the parties against and towards each other, in other words, to all their reciprocal rights and obligations, legal and equitable, which are implied by law. Some of these are the rights of foreclosure and redemption, the right to settle and adjust the mortgage debt, and to agree upon the terms of redemption and foreclosure respectively. There can be no doubt either that a mortgagee can, if he choose, release his debt altogether, without payment, and even without the consent of the debtor, on the principle of the maxim : *Quilibet potest renunciare iuri pro se introducto*: Broom's Maxims, 6th ed. p. 655. It was also argued that there was no difference between an assignment or discharge, which would vest the term in the mortgagor, and an assignment of the mortgage to a third person, and that if the latter could not be done without a new consent, neither could the former. But that is not so. There is a clear difference between the two cases. The right to make, and even to insist upon making, a reconveyance to the mortgagor or his representatives, arises out of the mortgage itself, which is an agreement to which the lessor has already given his consent; while an assignment to a third person is not made by virtue of anything in the mortgage deed, but the power to do so is a legal incident of that kind of property, and can only be done in pursuance of a new and independent agreement between the assignor and the intended assignee, for which the lessor's consent must be obtained."

And Moss, J.A., said :—

"It may be that a mortgagee in possession is not entitled to cast back the estate upon his mortgagor without his consent, though with his consent there is nothing to prevent it. But I apprehend it is undoubtedly an incident of every mortgage security that the mortgagee may if he chooses release his debt and restore to the mortgagor his estate. Is the plaintiff after having consented to the mortgages in question in a position to object that his consent is necessary to such a proceeding on the part of the mortgagees? True, the courts have not been willing to relieve mortgagees of leasehold from the consequences of their having taken assignments instead of underleases, and they have held them to the consequences of that proceeding whether they have or have not entered into possession of the mortgaged premises. But they do not appear to have gone the length of depriving mortgagees of any of the rights usually attendant upon the position."

If the mortgagor of a lease with right of renewal renews the lease or acquires the reversion, either before or after the expiration of the original lease, he will hold the renewal lease or the reversion subject to the mortgage;

Effect of
mortgagor's
renewing
lease or
acquiring
reversion.

and this will be so whether or not he is under obligation to the mortgagee to renew the lease or acquire the reversion. The renewed lease will be considered a graft on the old lease and subject in equity to the mortgage in the same manner as the former lease (*j*).

Where the assignee of a lease, subject to a mortgage thereof, and of the rights of renewal and of purchase given by the lease, exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage. The mortgagor and those claiming under him cannot assert title to the reversion as against the mortgagee (*k*).

**Renewal of
lease by
mortgagee.**

If a mortgagee renew a lease, the renewal will be for the benefit of the mortgagor, paying the mortgagee his charges. As Lord Chancellor Nottingham said :—

"The mortgagee doth here but graft upon his stock, and it shall be for the mortgagor's benefit" (*l*).

And this will be so if the renewal is after the expiration of the lease (*m*). These cases are based upon the general principle that no fiduciary can gain any personal advantage touching the subject of the trust.

If, however, the mortgagee obtain a new lease *bona fide*, after giving notice and an opportunity to renew to all parties interested, the renewal lease will not be in trust for the mortgagor (*n*).

**Mortgagee
of leasehold
in possession**

The mortgagee of a term of years, being in possession, will at the suit of the mortgagor be restrained from felling

(*j*) *Moody v. Matthews* (1801) 7 Ves. 174; *Fem v. Edwards* (1857) 1 DeG. & J. 598; *Jones v. Kearney* (1842) 1 D. & W. 134; *Leigh v. Burnett* (1885) 29 Ch. D. 231; *Hughes v. Howard* (1858) 25 Beav. 575; *Smith v. Chichester* (1842) 1 Conn. & Law. 486.

(*k*) *Building and Loan Association v. McKenzie* (1897) 28 Ont. 316; affirmed 24 Ont. App. 599; 28 S.C.R. 407.

(*l*) *Rushworth's Case* (1676) Freem. Ch. 13; *Luckin v. Rushworth* (1678) Rep. t. Finch. 392; S.C. 2 Ch. Rep. 113; *Darrell v. Whitchot* (1669) 2 Ch. Rep. 59.

(*m*) *Rakestraw v. Brewer* (1728) 2 P. Wms. 510.

(*n*) *Nesbitt v. Tredennick* (1808) 1 Ball & B. 29.

timber, even although he may have obtained the consent of the reversioner (*o*).

It is doubtful whether the *Act respecting Short Forms of Mortgages* (*p*) can be safely employed in drawing a mortgage of lease. For the act expressly provides that where the word "lands" occurs in the act it shall extend to "freehold lands and hereditaments" (*q*), and this expression does not include chattels real. It has been held that leaseholds will not pass under a general devise of real estate, unless aided by other words (*r*).

Application
to leases
of Short
Forms Act.

(*o*) *Chisholm v. Sheldon* (1850) 1 Gr. 318.

(*p*) R.S.O. (1897) c. 126.

(*q*) s. 1.

(*r*) *Swift v. Swift* (1859) 1 DeG. F. & J. 160. See Leith's Real Property Statutes 419.

SECTION II.

BUILDING SOCIETY MORTGAGES.

Building society mortgages may be divided into two classes :—

- (a) Where the borrower is not a member of the society.
- (b) Where the borrower is a member.

Of the first class there is little to be said, as the contract between the borrower and the society is practically the same as that of the ordinary mortgagor and mortgagee. The money is usually advanced in a lump sum and is made repayable in a stated number of instalments. When all the instalments have been paid the mortgagor is entitled to a discharge of his mortgage. It should be observed, however, that as the payments of principal and interest are blended the mortgage must comply with the provisions of *The Dominion Interest Act* (a) and state the amount of principal advanced as well as the rate of interest which is being charged, which rate must be calculated yearly or half-yearly not in advance. In computing the rate of interest it is not necessary to include any premiums which the borrower may be required to pay in consideration of the loan; for it has been held that these payments are in the nature of a bonus and not interest (b).

Provisions as
to interest.

Mortgagor a
member of
the society.

The relation between the borrower and the society is considerably modified in the second class of cases. The applicant for the loan in this instance is first obliged to become a member of the society. A number of shares, the maturity value of which will equal the amount to be advanced, are allotted to the applicant. The money is then advanced and the applicant is required to assign his shares to the society. These are of course of no value

(a) R.S.C. (1886) c. 127.

(b) *Ex parte Bath, re Phillips* (1883) 27 Ch. D. 509.

because as yet nothing has been paid in respect of them; he is therefore required to execute a mortgage by way of further security. This is to guarantee that the borrower will make all the payments which may be necessary to mature the shares which he has assigned to the society. The payments are made monthly as a rule, and the amount and number to be made are set out in the mortgage. It will be seen therefore that besides being a mortgagor the borrower has incurred certain liabilities as a shareholder and member of the society. This dual relationship has been the fruitful cause of litigation by reason of the fact that the borrower's relation to the society is frequently affected and altered by by-laws of the society passed subsequently to his becoming a member, and because his liability as a borrower is sometimes affected as well. The point to be investigated is, what alterations of the by-laws and rules will and what will not affect a member's liabilities as a mortgagor. It has been said that the contract of membership in a building society "carries *in gremio* the right on the part of the society to alter the rules from time to time"; and the courts have gone very far in holding a borrowing member bound by alterations in the rules made subsequently to his loan.

In *Rosenburg v. Northumberland Building Society* (c) an advanced or borrowing member executed a mortgage to the society to secure an advance made by them to him. The mortgage contained a covenant by the mortgagor to pay all subscriptions, fines and other moneys which, according to the rules for the time being of the society, should from time to time become due and payable by him in respect of the security or shares by virtue of which the advance was made to him. The proviso for redemption was expressed in similar terms. The rules in force at the date of the mortgage did not render advanced members liable to contribute to the losses of the society. The rules were afterwards altered by the introduction of a proviso

Alteration in
rules of
society.

that an advanced member should not be entitled to redeem his mortgage without paying in addition to what would have been due from him under the original rules his proportion of the losses of the society. It was held that the new rules applied to the mortgage, and that the plaintiff desiring to redeem his mortgage must do so in accordance with those rules. Fry, J. said :—

"It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership as well as by the contract of mortgage (cc)."

An advanced member is also bound by the altered rules, even if there is no provision in the mortgage to that effect (*d*) ; and it has been held that a building society may postpone the period of redemption of the mortgages of its advanced members by rules passed subsequently to the execution of the mortgages. A mortgagor claimed to redeem the mortgage which he had given to the society to secure the repayment of an advance by them to him in respect of his shares, which by one of the rules was to be repaid in twenty-two years ; and by another rule the mortgagor was moreover entitled to redeem before the expiration of the time for which the advance was made, in the manner provided by the rule. Advanced members were not bound to contribute to the losses of the society by the rules in force at the time the mortgage in question was given. By a subsequent alteration of the rules members paying off their mortgages were compelled to pay certain sums in addition to cover possible future losses, and it was held that the society was entitled to impose this extra burden on the mortgagors (*e*). The contract is one of membership and mortgage combined, and the society may levy fines and contributions on its mem-

(cc) *Rosenburg v. Northumberland Building Society* (1889) 22 Q.B.D. 373.

(d) *Bradbury v. Wild* [1893] 1 Ch. 377, per Kekewich, J. at p. 384.

(e) *Wilson v. Miles Platting Building Society* (1889) 22 Q.B.D. 381. See also *Baker v. Forest City* (1897) 28 Ont. 238 ; 24 Ont. App. 585 ; *Davies v. Second Chatham Building Society* (1889) 61 L.T.N.S. 680.

bers and thus affect their position. From the very nature of such societies it is obvious that this power is incorporated in the contract of membership (*f*).

The question remains to be considered, what is the extent of the society's power to alter and amend by-laws and what are the restrictions. A distinction seems to be drawn between new by-laws which impose new burdens and which must have been contemplated by the parties, or at any rate which must have been within the range of possibility because of the relation of membership, and those amendments or new by-laws which would alter the very nature of the contract. "New rules which alter the contract would not be binding on the mortgagor" (*g*). But no hard and fast rule can be laid down as to what alteration of the rules would be such a variation of the contract as not to be binding on the mortgagor. The court has in each case to examine the subject matter to which the alteration applies and to say whether it is material or trifling and so binding or not binding. But the courts have gone very far in holding advanced members bound by alterations in the by-laws, and even vested rights are subject to the still existing power of altering rules. Such a member has a vested right liable to be divested by any later rule duly passed (*h*). Regard must also be had to the laws regulating the society and to the original rules, and in general these new rules will regulate the mortgagor's position in regard to the security, it being not an ordinary mortgage to secure payment in terms of a definite sum of money due and payable by the mortgagor to the society, but to secure the due payment by him of periodical payments which he is bound to pay as a member of the society (*i*).

Extent of
power to
alter rules.

(*f*) *Bradbury v. Wild*, *supra*.

(*g*) *Bradbury v. Wild*, *supra*.

(*h*) *Pepe v. City and Suburban Permanent Building Society* [1893] 2 Ch. 311, per Chitty, J. at p. 313.

(*i*) *Wilson v. Miles Platting Society*, *supra*. per Kekewich, J. at p. 382.

CHAPTER IV.

WHO MAY BE MORTGAGOR AND MORTGAGEE.

Who may be
mortgagor
and
mortgagee.

As a general rule all persons who may be parties to any other contract may be mortgagors or mortgagees in a mortgage contract.

Property
may be
conveyed
by a person
to himself
or to his
wife.

Any property, real or personal, may be conveyed or assigned by a person to himself jointly with another person, by the like means by which it might be conveyed or assigned by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*a*).

Trustees
may
invest on
mortgages.

Trustees may invest trust moneys in their hands in first mortgages on lands held in fee simple. This is provided by section 2 of the *Trustee Investment Act* (*b*), which is as follows:—

2. (1) Trustees or executors having trust money in their hands, which it is in their duty, or which it is in their discretion, to invest at interest, shall be at liberty at their discretion to invest the same in any stock, debentures or securities of the Government of the Dominion of Canada, or of this Province; or in securities which are a first charge on land held in fee simple, provided that such investments are in other respects reasonable and proper, and such trustees or executors shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such stock, debentures, or securities aforesaid, and also, from time to time, at their discretion, to vary any such investments as aforesaid, for others of the same nature; and any such moneys already invested in any such stock, debentures or securities as aforesaid, shall be held and taken to have been lawfully and properly invested.

(2) This section shall apply and extend to both present and future trustees and executors.

Liability
of trustee
for breach
of trust.

The liability of a trustee lending money on the security of property is governed by sections 8 and 9 of the *Trustee Investment Act* (*c*), which is as follows:

- (*a*) R.S.O. (1897) c. 119, s. 37.
- (*b*) R.S.O. (1897) c. 130.
- (*c*) R.S.O. (1897) c. 130.

8. (1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed one half of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. This section shall apply to a loan upon any property on which the trustee can lawfully lend.

(2) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date.

9. (1) Where a trustee has improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This section shall apply to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date.

The power of executors and trustees to mortgage the property of their testator is governed by sections 16, 17, 18, 19 and 20 of the *Trustee Act (d)*, which are as follows:

Power of
executors
and trustees
to mortgage.

18. Where, by any will coming into operation after the eighteenth day of September, 1865, or after the passing of this Act, a testator charges his real estate, or any specific portion thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such estate, the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said real estate or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same think proper.

17. The powers conferred by the next preceding section shall extend to all and every the person or persons in whom the estate devised is for the time being vested by survivorship, descent or devise, or to any person or persons appointed under any power in the will or by the High Court, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

(d) R.S.O. (1897) c. 129.

18. If a testator who creates such a charge as is described in section 16 does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee or trustees, the executor or executors for the time being named in the will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore conferred upon the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship is for the time being vested; but any sale or mortgage under this Act shall operate only on the estate and interest of the testator.

19. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the preceding three sections of this Act, or any of them, have been duly and correctly exercised by the person or persons acting in virtue thereof.

20. The provisions contained in the preceding four sections shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the 18th day of September, 1865; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the said sections had not been enacted; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

Executor.

Where a testatrix, after a direction to pay her debts, devised land to her executor and trustee and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children, it was held that this was a devise of the land out and out as to the legal estate, and the words "his executors and administrators" being equivalent to "heirs and assigns" the executor had the right by virtue of section 16 of the *Trustee Act* (e) to mortgage the entire fee for debts; and that the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by section 19 of the act (f).

The *Devolution of Estates Act* (g) does not apply to a case where the executor derives his title to the land from,

(e) R.S.O. (1897) c. 130.

(f) *Mercer v. Neff* (1898) 29 Ont. 680; *In re Bailey, Bailey v. Bailey* (1879) 12 Ch. D. 268; *In re Tanqueray-Willaume and Landau* (1882) 20 Ch. D. 476.

(g) R.S.O. (1897) c. 127.

and acts under, the will and the provisions of the *Trustee Act* (h).

The devisee of real estate under the will of a testator subject to the *Devolution of Estates Act* and amendments has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the act in the legal personal representatives. And where real estate devised by a will so subject to the *Devolution of Estates Act*, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was during such period mortgaged by the devisee in good faith, it was held that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes (i).

Deeisee of
land may
mortgage.

The extent to which a bank may be a mortgagee is governed by sections 64, 68, 69, 70 and 71 of the *Bank Act* (j), which are as follows:—

Power of
bank to
mortgage.

64. The bank may open branches, agencies and offices, and may engage in and carry on business as a dealer in gold and silver coin and bullion, and it may deal in, discount and lend money and make advances upon the security of, and may take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, foreign and other public securities, and it may engage in and carry on such business generally as appertains to the business of banking; but, except as authorized by this Act, it shall not, either directly or indirectly, deal in the buying, or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever; and it shall not, either directly or indirectly, purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; and it shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any land, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

(h) *Mercer v. Neff* (1898) 29 Ont. 680.

(i) *Re McMillan, McMillan v. McMillan* (1893) 24 Ont. 181.

(j) 53 Viet. (D.) (1890) c. 31.

68. The bank may take, hold and dispose of mortgages and *hypotheques* upon real or personal, immovable or movable property, by way of additional security for debts contracted to the bank in the course of its business; and the rights, powers and privileges which the bank is by this Act declared to have or to have had in respect of real or immovable property mortgaged to it, shall be held and possessed by it in respect of any personal or movable property which is mortgaged or hypothecated to it.

69. The bank may purchase any lands or real or immovable property offered for sale under execution, or in insolvency, or under the order or decree of a court, as belonging to any debtor to the bank, or offered for sale by a mortgagee or other encumbrancer having priority over a mortgage or other encumbrance held by the bank or offered for sale by the bank under a power of sale given to it for that purpose, in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may acquire a title thereto as any individual purchasing at sheriff's sale, or under a power of sale, in like circumstances, could do, and may take, have, hold and dispose of the same at pleasure.

70. The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, and may purchase and acquire any prior mortgage or charge on such property; Provided always, that no bank shall hold any real or immovable property, howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof.

71. Nothing in any charter, Act or law shall be construed as ever having prevented or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged real or immovable property, whatever the value thereof is, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any property so mortgaged.

Mortgage
securing
indorsement.

A mortgage upon land given to secure indorsements upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the indorsements being made; and an assignment of such mortgage to a bank, before the making of the indorsements, is not a violation of section 45 of the *Bank Act*, R.S.C. (1886) chapter 120 (k).

Mortgage
securing
future
advances.

If a mortgage upon lands be given to a bank as security for future advances in contravention of the banking acts, and after the debt has been contracted or advances made another mortgage be executed upon the same property as

(k) *Re Essex Land & Timber Co., Trout's Case* (1891) 21 Ont. 367.

additional security for the debt so contracted or advances made, the second mortgage will be valid (*l*).

Where the directors of a joint stock company are empowered to borrow money they may do so by mortgaging the property of the company. The power to borrow money implies the power to mortgage (*m*). Joint stock company.

A municipal corporation may take a mortgage from a manufacturer to secure performance of conditions on which a bonus was granted (*n*). Municipal corporation.

As a general rule any person not being under any disability, beneficially entitled to property, may mortgage it to the extent of his interest therein. Capacity to mortgage.

Coverture is no longer a disability since the passing of the *Murried Women's Property Act* (*o*) in the case of a woman married since the first day of July, 1884, or in the case of property acquired by a married woman after that date. Coverture.

But a mortgage cannot be made by a married woman so as to defeat her husband's estate by the courtesy (*p*).

In Manitoba it has been held that a mortgage made by an Indian living on a reserve of land in the reserve is void (*q*). Mortgage by an Indian.

(*l*) *Grant v. La Banque Nationale* (1885) 9 Ont. 411.

(*m*) *Farrell v. Caribou Gold Mining Co.* (1897) 30 N.S.R. 199.

(*n*) *Corporation of the Village of Brussels v. Ronald* (1882) 4 Ont. 1.

(*o*) R.S.O. (1897) c. 163.

(*p*) *Moore v. Jackson* (1892) 19 Ont. App. 383.

(*q*) *Black v. Kennedy* (1877) Man. R. 144.

PART II.

RIGHTS AND LIABILITIES OF THE MORTGAGEE.

CHAPTER V.

RIGHTS OF MORTGAGEE GENERALLY.

Twofold interest of a mortgagee: real estate; personal estate.

Legal and equitable principles.

Right to hold his security: right to be paid.

Remedies of the mortgagee.

The interest of a mortgagee under a mortgage of the legal estate in land is twofold: a legal interest which is real estate, and a beneficial interest which is personal estate. By virtue of his having the legal estate the mortgagee is looked upon at law as being the owner of the property with the legal rights and remedies incident to such ownership. But in equity the mortgagor is regarded as the actual owner, subject to the right of the mortgagee to be paid his mortgage debt.

Since the passing of the Judicature Act legal and equitable principles are administered concurrently. Nevertheless legal and equitable rights are not to be treated as identical; it is only in case of conflict—where courts of law have adopted one rule and courts of equity another—that the rule of equity is to prevail (*a*).

A mortgagee claiming under a mortgage of real estate has two principal rights: (1) a right to hold the mortgage undiminished as a security for his investment, and to refuse to accept payment until the day agreed on for payment; and (2) a right to be paid the mortgage debt according to the terms of the contract. All the other rights of a mortgagee are subsidiary or ancillary to these.

When default has been made in payment of the moneys secured by the mortgage a mortgagee has various remedies

(*a*) *Joseph v. Lyons* (1884) 15 Q.B.D. 280, per Cotton, L.J., at p. 286.

for enforcing payment. He may maintain an action for foreclosure or sale of the mortgaged lands, even although no express provision to that effect is included in the mortgage deed; he may take possession of the mortgaged lands and occupy them himself, or may make leases of the same to others; and if the lands are in the possession of tenants of the mortgagor the mortgagee is entitled to be paid the rents due by them. Under certain circumstances the mortgagee is entitled to have a receiver appointed to receive the rents and profits of the lands and to have the net proceeds applied in payment of his mortgage debt. If there is a covenant for payment of the mortgage moneys, or in the absence of such a covenant if the mortgage was given to secure a debt or loan, the mortgagee may recover the amount in an action against the mortgagor and thus reach other property of the mortgagor besides the mortgaged lands. If provision is made therefor in the mortgage deed the mortgagee may distrain on the goods of the mortgagor for principal or interest. He may sell the property under a power of sale.

Equity regarding the mortgaged property with its produce as a security for the mortgage debt will restrict the rights of ownership of a mortgagor in possession within such bounds as may prevent detriment to the mortgagee (b). The mortgagee is entitled to hold his security undiminished and unimpaired and he may, in general, restrain the cutting and removal of timber and the removal or destruction of buildings or other fixtures on the mortgaged lands.

Thus the court will restrain the mortgagor from cutting timber on the mortgaged lands unless it be shown beyond all doubt that the lands will be ample security for the mortgage debt after the timber has been cut (c).

Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing and repairs

Mortgagee
may restrict
the rights of
ownership
of the
mortgagor in
possession.

Mortgagor
may be
restrained
from cutting
timber.

(b) *King v. Smith* (1843) 2 Hare 239; 18 R.C. 98.

(c) *McLean v. Burton* (1876) 24 Gr. 134.

upon the mortgaged premises, he may be restrained at the suit of the mortgagee from felling trees for other purposes (d), and he may be restrained at the suit of an execution creditor (e).

**Timber cut
may be
followed.**

The jurisdiction as to restraining the cutting and removal of timber is not preventive only; the court may in a proper case interpose where the timber can be followed. Where timber is cut without any intentional wrong, and there is no evidence of *mala fides*, the injury actually sustained by such cutting is the measure of damage to the mortgagee of the land (f).

**Mortgagee
entitled to
price of
timber sold.**

And so, where timber has been sold and removed the mortgagee is entitled to be paid by the purchaser the price of the timber sold (g).

The registration of a mortgage is notice to a purchaser of timber standing and growing on lands included in the mortgage (h).

**Second
mortgagee
liable to
account for
timber cut
by him.**

The remedy of a mortgagee against a mortgagor in possession or anyone claiming under him, who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient, is not limited to a mere prevention of the mischief by injunction; and where a second mortgagee in possession had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof, it was held that the second mortgagee was bound to account for the value of the timber cut and removed by him prior to the action (i).

**Mortgagee
may cut
timber
where
security is
scanty.**

Where the security is scanty the mortgagee himself may cut timber on the mortgaged lands to satisfy his debt (j).

(d) *Russ v. Mills* (1859) 7 Gr. 145.

(e) *Wason v. Carpenter* (1867) 13 Gr. 329.

(f) *McLean v. Burton* (1876) 24 Gr. 134.

(g) *Scott v. Vosburg* (1880) 8 P.R. 336.

(h) *McLean v. Burton* (1876) 24 Gr. 134.

(i) *McLeod v. Avey* (1888) 16 Ont. 365.

(j) *Brethour v. Brooke* (1893) 23 Ont. 658; 21 Ont. App. 144.

An action of trespass to vacant lands will lie by the mortgagee thereof. In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed and the lands taken by a railway company for the purpose of their undertaking, the mortgagee was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land (*k*).

A mortgagee out of possession cannot after his interest has ceased to exist maintain an action for trespass and injury to the freehold committed while he held the title (*l*).

Although a mortgagee has no right to complain of any subsequent dealing with the estate by the mortgagor, there is nothing to prevent him if his claim is left unsatisfied from suing on the covenant in the mortgage and proceeding to a sale under execution, or applying to the court to remove any subsequent fraudulent conveyance which interferes with the realization of his claim (*m*).

Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the statute 13 Elizabeth chapter 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the alleged transfer was of less value than the amount of the loan. And where shortly after the making of a mortgage the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of the mortgaged property at the time being greatly in excess of the amount of the loan and being deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although when the mortgage matured a sale of the property for the amount

Mortgagee
may
maintain
action of
trespass.

But not
after his
interest
has ceased.

Mortgagee
may
maintain
action to
remove
fraudulent
conveyance.

Mortgagee
is not a
creditor
within 13
Eliz. c. 5.

(*k*) *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11.

(*l*) *Brookefield v. Brown* (1893) 22 S.C.R. 398; see also *Doe d. Baxter v. Baxter* (1852) 2 All. (New Bruns.) 377.

(*m*) *Parr v. Montgomery* (1880) 27 Gr. 521.

Mortgagee is a purchaser within 27 Eliz. c. 4. of the mortgage debt could not be effected (*n*). A mortgagee, however, is a purchaser within the meaning of 27 Elizabeth chapter 4 (*o*).

Mortgagee entitled to compensation.

Mortgagor does not represent mortgagee.

Where lands subject to a mortgage are taken by a railway company under a railway act, the mortgagee is entitled to compensation. A mortgagor does not represent the mortgagee for the purposes of the *Railway Act of Ontario*, and is not included in the enumeration of the corporations or persons who under section 13 of R.S.O. (1897) chapter 207 are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption, and the mortgagee is entitled to have his compensation for lands taken separately ascertained (*p*).

In *Scottish American Investment Co. v. Prittie* (*q*), a railway company took possession of certain lands under warrant of the County Court judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of and took no part in the arbitration proceedings, and gave no consent to the taking of possession. An award was made but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded and release the lands in the possession of the railway company. It was held that the railway company were proper parties to the action, and that the plaintiffs were entitled to a judgment against all the defendants with a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

(*n*) *Crombie v. Young* (1894) 26 Ont. 194.

(*o*) *Lister v. Turner* (1846) 5 Hare 281; *Dolphin v. Aylward* (1870) L.R. 4 H.L. 486.

(*p*) *In re Toronto Belt Line Railway Co.* (1895) 26 Ont. 413; see also *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11.

(*q*) (1893) 20 Ont. App. 398.

So where land mortgaged by the owner was taken by a township council for a road, and the compensation having been ascertained by award the corporation paid the amount to a creditor of the mortgagor by whom it had been attached, it was held that the mortgagee had the prior right; that his mortgage being registered the corporation had notice of it; and that he was entitled to recover the amount from the corporation with costs (*r*).

A mortgagee of land adjoining a highway is one of the persons in whom the ownership of the land is vested for the purposes of sub-section 11 of section 640 of the *Municipal Act*, R.S.O. (1897) c. 223, and as such is entitled to pre-emption thereunder, subject to the right of the mortgagor to redeem it along with the mortgage or to have it sold to the mortgagor subject to the mortgage, if the mortgagor so prefer (*s*).

It has been held in Ontario that a mortgagee of an undivided share of land is not entitled to partition (*t*); but in England it seems that a mortgagee is entitled to this relief (*u*).

A tenant in common who has mortgaged his share is entitled to partition if the mortgagee consents (*v*).

Section 30 of the *Act respecting the Law and Transfer of Property* (*w*) provides as follows:—

30. In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct.

Township
council
taking land
for a road:
rights of
mortgagee.

Mortgagee
entitled to
pre-emption
under *Muni-
cipal Act*.

Mortgagee's
right to
partition.

Improver-
ments under
mistake of
title:
mortgagee's
rights.

(*r*) *Dunlop v. The Township of York* (1869) 16 Gr. 216.

(*s*) *Brown v. Bushey* (1894) 25 Ont. 612.

(*t*) *Mulligan v. Hendershott* (1896) 17 P.R. 227; *Laplante v. Seamen* (1883) 8 Ont. App. 557.

(*u*) *Fall v. Elkins* (1861) 9 W.R. 861.

(*v*) *Sinclair v. James* [1894] 3 Ch. 554; *McDougall v. McDougall* (1868) 14 Gr. 267; *Catton v. Banks* [1893] 2 Ch. 221.

(*w*) R.S.O. (1897) c. 119.

Mortgagee
is an
assignee.

Where a purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title, and it was subsequently found that the purchaser had acquired only the title of a life tenant, it was held that the mortgagee was an "assignee" of the person making the improvements within the meaning of this section and had a lien to the extent of his mortgage which he was entitled to enforce actively. The value of the improvements should be ascertained as at the date of the death of the tenant for life, and there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage. Interest should be allowed on the enhanced value from the date of the death of the tenant for life (*x*).

Mortgagee
not liable
for damage
done by
mortgagor.

A mortgagee is not liable for damage done by the mortgagor on the mortgaged property. Thus a mortgagee of land through which a stream flowed was held not liable for an injury caused by a mill-dam erected by the mortgagor in possession, although the money for which the mortgage was given was lent by the mortgagee for the purpose of building the dam (*y*).

Mortgagee
entitled
as against
mortgagor
to a lien for
moneys paid
to assignee.

Where a mortgagee assigned the mortgage covenanting for payment of the mortgage money, and subject to an agreement between the mortgagee and the assignee that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant, it was held that he was entitled to a lien therefor as against the mortgagor (*z*).

Mortgagee
has no lien
for taxes
paid by him.

But apart from express agreement a mortgagee has no lien for money paid by him for taxes on the mortgaged

(*x*) *McKibbon v. Williams* (1897) 24 Ont. App. 122.

(*y*) *McNaughton v. Fraser* (1855) 3 All. (New Bruns.) 247.

(*z*) *Fleming v. Palmer* (1866) 12 Gr. 226.

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lands or for money paid to redeem from a sale for taxes (a).

A mortgagee paying off a prior execution has a lien therefor as against subsequent execution creditors (b).

A mortgagee may become the purchaser of the equity of redemption at a sale under execution, but only on condition that he gives to the mortgagor a release of the mortgage debt. This is provided by section 32 of the *Execution Act* (c), which is as follows:

32. A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place has issued) may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser; but in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged lands (d).

Section 28 of the *Act respecting the Heir, Devisee and Assignee Commission* (dd) declares that any mortgage, incumbrance or lien created by the nominee of the Crown on lands for which the patent has not been issued may be registered and shall have the same force and effect, and no other, as if letters patent had before the execution of such instrument been issued in favour of the grantor. Under this provision the mortgagor and mortgagee have all the rights and liabilities as between themselves that they would have if the freehold were actually vested in the mortgagor (e).

A mortgagee, by virtue of his beneficial interest under the mortgage, is entitled to all accretions to or substitu-

Lien for
executions
paid off.

Mortgagee
purchasing
equity of
redemption.

Must release
mortgagor
from the
mortgage
debt.

Unpatented
lands :
rights of
mortgagor
and
mortgagee.

Mortgagee
entitled to
accretions;

(a) *Graham v. British Canadian Loan and Investment Co.* (1898) 12 Man. R. 244; *In re Leslie, Leslie v. French* (1883) 23 Ch. D. 552; *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234.

(b) *Trust and Loan Company v. Cuthbert* (1868) 14 Gr. 410.

(c) R.S.O. (1897) c. 77.

(d) A similar provision is in force in Nova Scotia: R.S.N.S. (1884) c. 184, s. 5.

(dd) R.S.O. (1897) c. 31.

(e) *Watson v. Lindsay* (1879) 27 Gr. 253; 6 Ont. App. 609.

tions for the mortgaged property, whether his security is legal or equitable (*f*).

and to
muniments
of title.

A legal mortgagee of real estate, whether of the fee or of a life estate therein, is entitled to the muniments of title to the estate; and a legal mortgagee of leaseholds is entitled to the lease and all documents relating only to the term (*g*).

Section 27 of the *Act respecting Mortgages of Real Estate* (*h*) provides as follows:—

27. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and was then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate is outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Fraudulent
concealment
of title
deeds.

Section 39 of the *Act respecting the Law and Transfer of Property* (*i*) provides:—

Action for
damages.

39. If any seller or mortagor of land, or of any chattels real or personal, or choses in action conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortagor, conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsifies any pedigree upon which the title depends or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, such seller, mortagor, solicitor or agent shall, irrespective of any criminal liability he may thereby incur, be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate is recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land.

(*f*) *Ex parte Bisdee, in re Baker* (1840) 1 M.D. & DeG. 333; 18 R.C. 137.

(*g*) *Smith v. Chichester* (1842) 2 Dr. & War., 393; 18 R.C. 128.

(*h*) R.S.O. (1897) c. 121.

(*i*) R.S.O. (1897) c. 119.

CHAPTER VI.

DISTRESS.

SECTION I.

FORM AND EFFECT OF PROVISO.

The right of the mortgagee to distrain on the lands of the mortgagor for arrears of interest or of principal does not arise from the relation of mortgagor and mortgagee and is not incident thereto. The right can only arise by express stipulation between the parties (*a*). Right created by contract.

There are two modes by which this right is usually given to the mortgagee. First, a simple stipulation in the mortgage deed that the mortgagee may distrain; and secondly, a stipulation whereby the relation of landlord and tenant is created between the parties. In the latter case the right to distrain arises by implication as incident to the relation of landlord and tenant. License and attorney.

No set form of words is necessary to give the mortgagee the right to distrain. The mortgage deed may provide that the mortgagee may distrain for all the mortgage moneys, principal as well as interest, and this without regard to the value of the land and whether the goods are on the mortgaged premises or elsewhere. As between the parties there is no doubt that such a stipulation is perfectly valid. Right to distrain for interest or principal may be given.

In Ontario the usual form of stipulation is the statutory

Statutory distress clause.

(*a*) For a full and instructive discussion of the rights of a mortgagee in regard to distress see articles by Mr. A. H. Marsh, Q.C. in 6 C.L.T. p. 217, 265 and 313.

(*aa*) *Hobbs v. The Ontario Loan and Debenture Company* (1890) 18 S.C.R. 483, per Patterson J. at p. 552.

distress clause contained in the *Act respecting Short Forms of Mortgages* (b):—

15. Provided that the mortgagee may distrain for arrears of interest.

If the mortgage deed is expressed to be made in pursuance of the act this form of words shall be taken to have the same effect and be construed as if the mortgage deed contained the following form :—

15. And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and, by distress warrant, to recover by way of rent reserved, as in the case of a demise, of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in all cases of distress for rent (c).

Does not
create
relation of
landlord and
tenant.

This clause does not create the relation of landlord and tenant between the mortgagor and mortgagee, but operates simply as a personal license from the mortgagor to the mortgagee that it shall be lawful for the latter to distrain upon the goods of the former (d).

Interest
accruing
after
maturity of
principal
cannot be
distrained
for unless
special
provision.

It would seem from the provisions of the statutory clause that the mortgagee may exercise his right to distrain at any time whether before or after the maturity of the mortgage debt or of any instalment thereof. But only arrears of interest which shall have accrued before the maturity of the mortgage debt can be distrained for in cases where there is no provision in the mortgage for payment of interest after maturity. In such cases the interest payable after maturity of the principal would be recoverable, not by the terms of the contract, but as damages, and the right to distrain under the statutory power is given

(b) R.S.O. (1897) c. 126, Schedule B., clause 15.

(c) Schedule B, clause 15.

(d) *Trust and Loan Co. v. Lawrason* (1882) 10 S.C.R. 679.

only where the mortgagor makes default in payment at the time limited therefor (e).

A mortgagee having made a first seizure for arrears of interest and abandoned the seizure cannot seize a second time for the same demand. A seizure for more than is due is illegal (f). Second seizure illegal.

ii. *Attornment Clause.*

It has been held that a stipulation in the form of the statutory distress clause (g) coupled with the provision that the mortgagor should continue in possession until default, and his occupation in pursuance thereof, created the relation of landlord and tenant at a fixed rent (h). That decision was reversed by the Ontario Court of Appeal, but it is uncertain upon what grounds as the written judgment was lost (i). Former decision as to statutory distress clause.

It has since been held by the Supreme Court of Canada that such a distress clause does not create the relation of landlord and tenant (j). In the case just cited the mortgage in question contained in addition to the statutory distress clause the following provision:—

“And the mortgagor doth release to the company all his claims upon the said lands and doth attorn to and become a tenant at will to the company subject to the said proviso.” And it was held affirming the judgment of the Court of Appeal (k), the Supreme Court being equally divided, that the relation of landlord and tenant was not created by the statutory distress clause. And it was further held that the attornment clause in the mortgage in question failed to create a tenancy on the ground that

(e) *Klinck v. The Ontario Industrial Loan and Investment Co.* (1888) 16 Ont. 562; *Powell v. Peck* (1888) 15 Ont. App. 138.

(f) *La Vassaire v. Heron* (1880) 45 U.C.R. 7.

(g) R.S.O. (1897) c. 126 Schedule B, clause 15.

(h) *Royal Canadian Bank v. Kelly* (1869) 19 U.C.C.P. 196.

(i) Mr. Leith, Q.C., one of the counsel engaged in the case gave a report of the judgment from memory. This is to be found in 14 C.L.J. 8.

(j) *Trust and Loan Co. v. Lawrason* (1882) 10 S.C.R. 679.

(k) 6 Ont. App. 286.

Statutory distress clause does not create relation of landlord and tenant.

there was no reservation of rent sufficient to entitle the mortgagees to claim the landlord's right as against an execution creditor.

Relationship of landlord and tenant may be created between mortgagor and mortgagee.

It is, however, well settled by authority that the parties to a mortgage of real property may agree that in addition to their principal relation as mortgagor and mortgagee they shall also as regards the mortgaged lands stand towards each other in the relation of landlord and tenant, the mortgagor remaining in possession as tenant of the mortgagee. In *Ex parte Jackson, in re Bowes* (*l*) Cotton, L.J. in delivering judgment said :—

"Undoubtedly a mortgagor and a mortgagee have the right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee and thus by contract constituting the relation of landlord and tenant between them."

Thesiger, L.J. in the same case said :—

"There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves and that they may and ordinarily do create the relationship of tenant and landlord between the mortgagor and mortgagee and with it the ordinary right of distress which the law attaches to that relationship" (*m*).

The stipulation must conform to the law of landlord and tenant and it must be a real tenancy.

It is essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and it should appear that it was really the intention of the parties to create a tenancy at the rent reserved, and not merely to give the mortgagee under colour or pretence of the lease an additional security incidental to his character of mortgagee. If these conditions are complied with the relation of lessor and lessee is considered to be established not only as between the parties themselves but in respect of third persons also. In such a case the mortgagee, if not restricted by statute, may distrain for rent in arrear upon the goods of the mortgagor, and also upon the goods of a stranger found upon the mortgaged or demised lands, and may insist as against the sheriff and

(*l*) (1880) 14 Ch. D. 726.

(*m*) 14 Ch. D. at p. 743. See also *Kearsley v. Philips* (1883) 11 Q.B.D. 621 at p. 624.

the execution creditors of the mortgagor upon the rights conferred on landlords by the Statute 8 Anne chapter 14(*n*).

The attornment clause is generally in the following form :—

Form of
attornment
clause.

"The mortgagor hereby attorns to the mortgagee and becomes a tenant of the said lands during the term of this mortgage at a rent equivalent to and payable at the same days and times as the payments of interest are hereinbefore agreed to be paid, such rent when so paid to be in satisfaction of such payments of interest. Provided that the mortgagee may in default of payment or on breach of any of the covenants hereinbefore contained enter on the said lands and determine the tenancy hereby created without notice. Provided that neither the existence of this clause nor anything done by virtue thereof shall render the mortgagee liable as mortgagee in possession so as to be accountable for moneys except those actually received."

Where a mortgage deed contained the following attornment clause :—"And the said mortgagor doth hereby attorn to and become tenant of the said lands to the mortgagees at a yearly rental of \$96 to be paid in the manner and upon the terms hereinbefore appointed for the payment of interest," it was held that a valid relationship of landlord and tenant was created (*o*).

In *Hobbs v. The Ontario Loan and Debenture Company* (*p*) it was held that the admission under seal by the mortgagor of the terms of the demise amounts to an estoppel binding on him (*q*).

Mortgagor
estopped.

It is not necessary to the creation of a valid tenancy that the mortgage deed should be executed by the mortgagee, notwithstanding the provisions of the *Statute of Frauds* (*r*).

The mort-
gage deed
need not be
executed
by the
mortgagee.

The *Statute of Frauds* (*s*) provides that leases which are not in writing signed by the parties making the same shall operate as tenancies at will; but this provision only

(*n*) *Hobbs v. The Ontario Loan and Debenture Company* (1890) 18 S.C.R. 483, per Strong J. (now C.J.) at p. 493; *McKay v. Grant* (1893) 30 C.L.J. 70.

(*o*) *Linstead v. The Hamilton Provident and Loan Society* (1896) 11 Man. R. 199.

(*p*) (1890) 18 S.C.R. 483, at p. 495.

(*q*) See also *Ex parte Voisey, in re Knight* (1882) 21 Ch. D. 442.

(*r*) *Hobbs v. The Ontario Loan and Debenture Company* (1890) 18 S.C.R. 483; *Morton v. Woods* (1869) L.R. 4 Q.B. 293.

(*s*) 29 Car. II. c. 3.

applies to tenancies which exceed three years. A tenancy which at the time of the contract may last for less than three years is not within the statute.

Rent need
not be paid

Nor the
mortgagor
let into
possession.

Reversion
need not be
in the
mortgagee.

Several
mortgagees
may be
landlords
to one
mortgagor.

The attornment to the mortgagee by deed executed by the mortgagor in possession and delivered to the mortgagee is sufficient evidence of the creation of the tenancy between the parties. It is not necessary in order to constitute a tenancy that rent should be paid (*t*). Nor is it necessary to the creation of a valid tenancy that the mortgagor should be let into possession. It is sufficient if there is a continued occupation by the mortgagor instead of a change of possession and a letting into possession again (*u*).

In order to enable the mortgagee to distrain under such a clause the legal reversion of the lands need not be in the mortgagee.

In *Morton v. Woods* (*v*) Cockburn, C. J. said:—

“Although it may appear on the face of the deed that the defendants, the lessors, have not the legal estate yet the tenant and those who claim through him are estopped, after he has attorned, from denying that the relation of landlord and tenant existed between the defendants and the mortgagor so as to pass as between them the reversion of the lessor.”

There may be two or more attornments by the same mortgagor to different mortgagees; and the mortgagees will be entitled to distrain for the purposes of their respective mortgages and during the same period of time (*w*). In *Ex parte Punnett* (*x*) Jessel, M.R., said:—

“If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee and that the mortgagor is not really the owner of the reversion, you can create a tenancy between the second mortgagee and the mortgagor by what may be called estoppel, or quasi-estoppel (it does not matter what term we use), it appears to me that there is nothing either in law or in good sense to prevent the same arrangement being made with more than one mortgagee.”

(*t*) *West v. Fritche* (1848) 3 Exch. 216; *Morton v. Woods* (1868) L.R. 3 Q.B. 658; 4 Q.B. 293; *Ex parte Voisey, in re Knight* (1882) 21 Ch. D. 442.

(*u*) *Morton v. Woods* (1868) L.R. 3 Q.B. 658; *West v. Fritche* (1848) 3 Exch. 216.

(*v*) (1868) L.R. 3 Q.B. 658 at p. 667.

(*w*) *Ex parte Punnett* (1880) 16 Ch. D. 226.

(*x*) (1880) 16 Ch. D. 226.

A rent that is certain is essential to the creation of a valid tenancy. The rent must be fixed and certain but it may fluctuate. It is sufficient if by calculation it may be rendered certain. *Id certum est quod certum reddi potest.* Thus where the rent reserved was a monthly instalment of a fixed amount together with a fine of five per cent. per month on the whole amount unpaid, the rent was held to be sufficiently ascertained (y).

But where a mortgage contained a special provision by which the mortgagors became lessees of the mortgaged lands until the maturity of the mortgage at a rental of the same amount as the interest, and the mortgagee distrained for arrears of interest which accrued after the maturity of the mortgage, it was held that there was no definite tenancy after the maturity of the mortgage and that, the interest thereafter being recoverable not by the terms of the contract but as damages, the rent became uncertain and therefore there was no right of distress (z).

It is also laid down that there must be an affirmative covenant that the mortgagor shall hold for a determinate time in order to make a valid re-demise (a).

Where a mortgage deed contains a stipulation that the mortgagor shall become tenant to the mortgagee upon making default in any of the payments the mortgagee has no right to distrain unless he shall have given notice previously to the mortgagor that he intends to treat him as a tenant (b).

A tenancy from year to year or from month to month will be a good yearly or monthly tenancy notwithstanding that the mortgage contains a proviso that it may be

Tenancy from year to year and tenancy at will.

(y) *Ex parte Voisey* (1882) 21 Ch. D. 442; *Trust and Loan Company v. Lawrason* (1882) 10 S.C.R. 679.

(z) *Klinck v. The Ontario Industrial Loan and Investment Company* (1888) 16 Ont. 562.

(a) *Trust and Loan Company v. Lawrason* (1885) 10 S.C.R. 679 at p. 706.

(b) *Clowes v. Hughes* (1870) L.R. 5 Ex. 160.

determined at any time by the will of the mortgagee (*c*). There may be a tenancy at will although the rent reserved be payable yearly (*d*).

A tenant at will is not at liberty to put an end to his tenancy by parting with his interest unless the lessor at will have notice thereof (*e*).

Right to distrain postponed by proceedings for sale.

If the mortgagee has given notice of his intention to exercise the power of sale contained in the mortgage, his right to distrain will be postponed until the time has expired after which according to the notice the power of sale is to be exercised (*f*).

Right to distrain not merged in judgment for mortgage moneys.

If the mortgagee obtains a judgment for the interest, or for the principal and interest, the remedy of distress is not thereby merged. A judgment is but a security for the debt until it be satisfied, and does not operate to change any other concurrent remedy which the mortgagee may have (*g*).

Devises may distrain.

The assignee of a mortgage cannot distrain for arrears of rent which have accrued before the assignment (*h*).

Tenancy at will determined by death of mortgagor.

The power to distrain under a tenancy from year to year or for a term of years may be exercised by the devisees of the mortgagee (*i*).

Where the tenancy is a tenancy at will it comes to an end with the death of the mortgagor, and the mortgagee cannot distrain upon the heirs (*j*); the executors of the lessor may distrain for arrears of rent upon lands demised for any term or at will at any time within six months after the determination of the tenancy and while the

(*c*) *In re Threlfall* (1880) 16 Ch. D. 274; *Ex parte Voisey* (1882) 21 Ch. D. 442; see also *Kemp v. Lester* [1896] 2 Q.B. 162.

(*d*) *Doe d. Dixie v. Davies* (1851) 7 Ex. 89.

(*e*) *Pinhorn v. Souster* (1853) 8 Ex. 763.

(*f*) R.S.O. (1897) c. 121, s. 31.

(*g*) *Drake v. Mitchell* (1803) 3 East 251; *Westmoreland &c. Slate Co. v. Fielden* [1891] 3 Ch. 15; *Wegg Prosser v. Evans* [1894] 2 Q.B. 101; [1895] 1 Q.B. 108.

(*h*) *Brown v. The Metropolitan Counties etc. Assurance Society* (1859) 1 E. & E. 832.

(*i*) *West v. Fritche* (1848) 3 Exch. 216.

(*j*) *Scobie v. Collins* [1895] 1 Q.B. 375.

tenant is in possession. This is provided by sections 13 and 14 of the *Trustee Act*, R.S.O. (1897) chapter 129 which are as follows:—

13. The executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living.

14. Such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distresses for rent shall be applicable to the distresses so made as aforesaid.

The creation of the relation of landlord and tenant in this way by express stipulation does not alter the equitable relation existing between them which arises out of the relation of mortgagor and mortgagee. The existence of the tenancy may interfere with the mortgagee's right to take possession unless he has the power to determine the tenancy at any time (*k*); and a clause giving the mortgagee this right is valid (*l*).

When a tenancy has been created the mortgagee as landlord will be entitled to exercise the rights and will be subject to the liabilities arising out of the relation of landlord and tenant.

The effect of an attornment clause is to render a mortgagee liable as mortgagee in possession to account to subsequent incumbrancers for rent which but for his wilful default he might have received (*m*). A stipulation is usually inserted that the mortgagee shall not be liable as mortgagee in possession for any moneys except those actually received.

An attornment clause does not come within the Ontario Bills of Sale Act and does not require to be registered in

Tenant
does not
alter the
relation of
mortgagor
and
mortgagee
as such.

Rights and
liabilities of
mortgagee
as landlord.

Effect of
attornment
clause—
mortgagee in
possession.

Attornment
clause not
within the
Bills of Sale
Act in
Ontario.

(*k*) *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335.

(*l*) *Doe d. Garrod v. Olley* (1840) 12 A. & E. 481; *Metropolitan Counties &c. Assurance Society v. Brown* (1859) 4 H. & N. 428.

(*m*) *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335: *Ex parte Punnett* (1880) 16 Ch. D. 226; *Ex parte Harrison* (1881) 18 Ch. D. 127 at p. 135. But Bacon V.-C. in *Stanley v. Grundy* (1883) 22 Ch. D. 478 decided otherwise.

pursuance thereof (*n*). But the provisions of the English Bills of Sale Acts of 1878 and 1882 apply expressly to instruments giving powers of distress by way of security (*o*).

**Landlord
cannot
distain but
within six
months after
expiration
of tenancy.**

Under the Statute 8 Anne chapter 14 the landlord may not distain but within six months next after the termination of the tenancy. And a mortgagee who distained two years after the maturity of the mortgage, when by a special provision in the mortgage deed the tenancy expired, was held liable in an action for illegal distress (*p*).

**Goods seized
are in custo-
dia legis.**

Pending the distress the goods taken by the mortgagee are in the custody of the law and not liable to seizure by chattel mortgagees or execution creditors so long as no fraud is on foot and no contention or contrivance exists to prejudice chattel mortgagees (*q*).

**Tenancy
must be real
not fictitious.**

In order to give the mortgagee the right to distain as against creditors the tenancy created must be a real tenancy entered into in good faith and intended to be acted upon. If the attornment clause is merely contrived to enable the mortgagee to seize the goods of the mortgagor in case of the latter's insolvency no tenancy is created and none of the incidents of the tenancy arise, and the mortgagee is not entitled to distain (*r*).

**Amount of
rent reserved
material in
determining
bona fides.**

It is material in determining the *bona fides* of the tenancy to consider the amount of rent reserved by the mortgagee. Where the rent is out of all proportion to the annual value of the lands the inference is that it was not the *bona fide* intention of the parties to create a tenancy. In *Ex parte Jackson* (*s*) Baggallay, L.J. in delivering judgment said:—

"So far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be

(*n*) *Trust & Loan Co. v. Lawrason* (1881) 6 Ont. App. 286; *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335.

(*o*) *Green v. Marsh* [1892] 2 Q.B. 330.

(*p*) *Klinck v. Ontario Industrial Loan & Investment Company* (1888) 16 Ont. 562.

(*q*) *Anderson v. Henry* (1898) 29 Ont. 719.

(*r*) *Ex parte Jackson* (1880) 14 Ch. D. 725.

(*s*) (1880) 14 Ch. D. 725.

derived from the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent such as the ordinary tenant would be willing to give for the property under ordinary circumstances? That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision, not necessarily the exact amount which a tenant would pay for the property but such an amount as a willing tenant would probably pay as a *bona fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that although you may call it rent it is no longer a real rent but a fictitious payment under the name of rent."

And so where a mortgage of real estate provided that the moneys secured thereby amounting to \$20,000 should be payable with interest at seven per cent. per annum as follows:—\$500 on December 1st, 1883; \$500 on the first days of June and December in each of the four following years; and \$15,500 on June 1st, 1888; and contained an attornment clause reserving rent equal in amount to the amount so payable; it was held that the rent reserved was so unreal and excessive as to show conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious (*t*). The stipulation, however, will be supported if the rent, although a large rent, is one which a tenant honestly might agree to pay and the landlord honestly might expect to receive (*u*).

A mortgagee may apply the proceeds of a distress for rent in payment of whatever is due to him whether for principal or interest. A contrary intention is not shown by the fact that the amount fixed for rent is equal to the sum due for interest and is payable on the same days (*v*).

Application
of proceeds.

(*t*) *Hobbs v. Ontario Loan and Debenture Co.* (1890) 18 S.C.R. 483; see also *Imperial Loan & Investment Company v. Clement* (1896) 11 Man. R. 428 and 445.

(*u*) *Ex parte Williams, in re Thompson* (1877) 7 Ch. D. 138; *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335.

(*v*) *Ex parte Harrison, in re Betts* (1881) 18 Ch. D. 127, overruling *Hampson v. Fellows* (1868) 6 Eq. 575.

SECTION II.

LIMITATIONS OF THE RIGHT OF DISTRESS.

i. *To the Goods of the Mortgagor.*

Effect of
attornment
clause.

A valid attornment clause gives to the mortgagee all the rights of a landlord. If not restricted by statute the mortgagee may distrain upon the goods of third persons and will be entitled to priority over execution creditors (*w*).

In Ontario under section 31 of the *Landlord and Tenant's Act* (*x*) a landlord shall not distrain for rent on the goods and chattels of any person except the tenant or person who is liable for the rent, although the same are found on the premises; even although the goods are found on the premises. Section 31 is as follows :—

31. (1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply.

Only goods
of the
mortgagor
may be
distrained.

The right given by the statutory distress clause being merely a personal license the mortgagee cannot distrain any goods other than those of the mortgagor. This, no

(*w*) *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335; *Kearsley v. Philips* (1883) 11 Q.B.D. 621.

(*x*) R.S.O. (1897) c. 170.

doubt, was always the law (*y*). But to remove doubt the Legislature by section 15 of the *Act respecting Mortgages of Real Estate* enacted that under mortgages made after the 25th day of March, 1886, the right of a mortgagee to distrain for interest in arrear upon a mortgage should be limited to the goods and chattels of the mortgagor (*z*). Section 15 is as follows:—

15. The right of a mortgagee to distrain for interest in arrear upon a mortgage shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels to such only as are not exempt from seizure under execution. This section shall not apply to mortgages existing on the 25th day of March, 1886.

This section has been held to apply to the case of a mortgagee who by express stipulation in his mortgage deed stands in the relation of landlord to his mortgagor (*a*). In Manitoba it has been held otherwise (*b*).

In *Edmonds v. Hamilton Provident and Loan Society* cited above Osler, J.A. in delivering judgment at p. 358 said:—

"This section has also, I think, the effect of limiting in the same way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage by which the mortgagors 'attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest reserved, payable at the time mentioned in the proviso.' This section is a general one taken from section 3 of 49 Vict. ch. 29, *An Act respecting Landlords and Tenants and Distresses*. Had it been intended to deal only with the mortgagee's right to distrain under a mere license, the enactment would have been unnecessary. I think the intention was to reach every case in which the mortgagee whether in the character of landlord or licensee, still under and for the purposes of the mortgage, had the right to distrain. The section is wide enough to cover every case and I cannot accede to the argument that the next section, which is taken from a subsequent act, controls its generality."

In Manitoba under the *Act respecting Distresses and Extra-judicial Seizures* (*c*), the right of the mortgagee to distrain for interest due upon the mortgage is limited to

Even where
the mortga-
gee is
landlord
to the
mortgagor.

Limited to
goods of
mortgagor
and to goods
not exempt.

(*y*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347, per Osler J. at p. 358.

(*z*) R.S.O. (1897) c. 121.

(*a*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347.

(*b*) *Linstead v. Hamilton Provident and Loan Society* (1896) 11 Man. R. 199.

(*c*) R.S. Man. (1891) c. 46, s. 2.

Does not apply to mortgagee as landlord.

the goods and chattels of the mortgagor only, and so at such goods and chattels to such only as are not exempt from seizure under execution. It has been held, however, that this section has no reference to the right of a mortgagee to distrain for rent under a tenancy validly created but only to the right to distrain for interest as such under the ordinary distress clause contained in the *Act respecting Short Forms of Indentures* (*d*). This distress clause is identical with that contained in the Ontario act.

Where a mortgage deed contains a provision that the mortgagee may distrain for arrears of interest and also an attornment clause by which the mortgagor becomes a tenant of the mortgagee, and the mortgagee distrains for arrears of interest, but not for rent as such, on the crops of a lessee of the mortgagor, the distress is wholly illegal for the defendant can only take the goods of the mortgagor for arrears of interest (*e*).

The right of the mortgagee, therefore, does not extend to the goods of the assignee of the equity of redemption. So that where the lands are sold by the mortgagor and he is not in possession the mortgagee's right to distrain is gone.

ii. *Limited to Goods not exempt from Seizure under Execution.*

Landlord cannot distrain goods exempt from seizure under execution.

In Ontario the goods and chattels exempt from seizure under execution shall not be liable to seizure by a landlord for rent in respect of a tenancy created after the first day of October, 1887, as provided by section 30 of the *Landlord and Tenant's Act* (*f*). But a tenant who is in default for non-payment of rent and claims the benefit

(*d*) *Linstead v. Hamilton Provident and Loan Society* (1896) 11 Man. R. 199.

(*e*) *Miller v. Imperial Loan and Investment Company* (1896) 11 Man. R. 247; 16 C.L.T. 298. See also *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347.

(*f*) R.S.O. (1897) c. 170.

of the exemption from distress to which he is entitled under that act must give up possession of the premises forthwith or be ready and offer to do so. This is provided by section 32.

By section 15 of the *Act respecting Mortgages of Real Estate* (g) above quoted the right of a mortgagee to distrain for interest in arrear on a mortgage is limited to the goods and chattels of the mortgagor, and as to such goods to such only as are not exempt from seizure under execution (h).

Mortgagee can distrain for interest on goods of mortgagor only, and only on goods not exempt from seizure under execution.

(g) R.S.O. (1897) c. 121.

(h) In Ontario the following provisions regarding exemptions from seizure under execution are contained in the *Execution Act*, R.S.O. (1897) c. 77, ss. 2 & 3:-

2. The following chattels shall be exempt from seizure under any writ, in respect of which this Province has legislative authority, issued out of any Court whatever in this Province, namely:

(1) The bed, bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family ;

(2) The necessary and ordinary wearing apparel of the debtor and his family ;

(3) One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated not exceeding in value the sum of \$150 ;

(4) All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of \$40 ;

(5) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of \$75, and food therefor for thirty days, and one dog ;

(6) Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100 ;

(7) Bees reared and kept in hives to the extent of fifteen hives. Bees.

3. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in clause 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to

Goods exempt from seizure under execution.

Bedding.

Wearing apparel.
Furniture.

Food and fuel.

Animals.

Tools.

Election of debtor.

iii. *Limited to six Years' Arrears as between the Parties and one Year's Arrears as against Creditors.*

Limited to
six years'
arrears
as between
the parties.

Where the mortgagee has the right to distrain for arrears of interest or rent he is limited as between the parties and against the lands to six years' arrears. Section 17 of the *Real Property Limitation Act* (*i*) is as follows:—

17. No arrears of rent, or of interest in respect to any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

Twenty
years'
arrears
recoverable
by action on
the covenant.

This section does not limit the amount of arrears of interest recoverable in an action on the covenant for payment. In mortgages made before the 1st day of July, 1894, twenty years' arrears, and in mortgages made after that date ten years' arrears are recoverable by action on the covenant (*j*).

Limited to
one year's
arrears as
against
creditors.

As against creditors of the mortgagor the right of the mortgagee is further limited to one year's arrears by the *Act respecting Mortgages of Real Estate* (*k*). Section 16 of that act is as follows:—

16. (1) As against creditors of any mortgagor or person in possession of mortgaged premises under a mortgagor, the right, if any, to distrain upon the mortgaged premises for arrears of interest or for rent, in the nature of or in lieu of interest under the provisions of any mortgage executed after the 23rd day of April, 1887, shall be restricted to one year's arrears of such interest or rent, but this restriction shall not apply unless some one of such creditors shall be an execution creditor, or unless there shall be an assignee for the general benefit of such creditors appointed before lawful sale of the goods distrained, nor unless the officer executing such writ of execution, or such assignee shall, by notice in writing to be given to the

\$100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same do not exceed \$100, or, if the same exceed \$100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

(*i*) R.S.O. (1897) c. 133.

(*j*) R.S.O. (1897) c. 72, s. 1.

(*k*) R.S.O. (1897) c. 121, s. 16, sub-ss. 1, 2, 3.

person distraining, or his attorney, bailiff, or agent, before such lawful sale, claim the benefit of the said restriction, and in case such notice is so given, the distrainor shall relinquish to the officer or assignee the goods distrained, upon receiving one year's arrears of such interest or rent and his reasonable costs of distress, or if such arrears and costs shall not be paid or tendered he shall sell only so much of the goods distrained as shall be necessary to satisfy one year's arrears of such interest or rent and the reasonable costs of distress and sale, and shall thereupon relinquish any residue of goods, and pay any residue of moneys, proceeds of goods so distrained, to the said officer or assignee.

(2) Any officer executing a writ of execution, or any assignee who shall pay any money to relieve goods from distress under the next preceding sub-section, shall be entitled to reimburse himself therefor out of the proceeds of the sale of such goods.

(3) Goods distrained for arrears of interest or rent, as aforesaid, shall not be sold except after such public notice as is now required to be given by a landlord who sells goods distrained for rent.

In Manitoba the landlord is limited to three months' arrears of rent where the same is payable quarterly or more frequently, and to one year's arrears when the same is payable less frequently than quarterly, as against any writ of execution or attachment issued out of any court of that Province (*l*).

Thus far we have discussed the right of a mortgagee to distrain where that right is created by express agreement in the mortgage deed. The restrictions referred to will not affect the mortgagee's right to distrain where after default he has taken possession of the mortgaged lands and leased the same, or where he has given notice to the tenants of the mortgagor requiring them to pay the rent to him. In these cases a new relation of landlord and tenant arises which is quite distinct from that created by the mortgage deed.

(*l*) R.S. Man. (1891) c. 46, s. 3.

CHAPTER VII.

ACTION ON THE COVENANT FOR PAYMENT.

SECTION I.

GENERALLY.

Remedies generally.

A mortgagee under an ordinary mortgage usually has both real and personal remedies for the recovery of the mortgage moneys. He may distrain on the goods of a mortgagor subject to the power contained in the mortgage deed, and may apply the proceeds in payment of the mortgage debt; he may recover possession and lease or sell the lands; or he may bring an action on the covenant in the mortgage and thus reach other property of the mortgagor by way of execution. Where the mortgage security is thought to be insufficient to pay the mortgage debt in full, it is advisable to bring an action on the covenant; and where there is a surety for the payment of the mortgage money an action on the covenant is often the only remedy against the surety.

Action will not lie if no covenant and no debt.

Where the mortgage deed contains no covenant for payment an action will not lie as a general rule against the mortgagor unless there is evidence of a debt or loan. The mere proviso for payment will not be sufficient to found an action (*a*). And it has been held that the words in the proviso "in three equal payments to be respectively made" do not create a covenant to pay (*b*).

Where the mortgage deed contains a proviso that the mortgage shall be void on payment of the mortgage moneys and also a proviso to sell and eject on default, but does not contain a covenant to pay, the mortgagor is not liable

(*a*) *Martin v. Woods* T.T. 3 & 4 Viet. 1 R. & J. Dig. 863; *Hall v. Morley* (1853) 8 U.C.R. 584.

(*b*) *Jackson v. Yeomans* (1869) 19 U.C.C.P. 394.

to pay upon mere proof of the mortgage. There must be evidence also of a loan or debt; and a promise to pay in consideration of forbearance to sue would not be binding, although a promise would be binding if made in consideration of forbearance to sell or eject (c). And where the mortgage was payable in instalments and one of the payments was made and the mortgagor promised to pay a further instalment then overdue in consideration of the mortgagee forbearing to take any proceedings on the mortgage for two months, it was held that the mortgagee could not recover; for the promise which was verbal was a contract for an interest in lands within section 4 of the *Statute of Frauds*; and if the transaction amounted to a lease it was not binding unless in writing under section 2 of the statute (d).

Where a mortgage contains an acknowledgment of the receipt of mortgage money but no covenant for repayment this does not of itself afford conclusive evidence of a debt, so as to enable a mortgagee or his assignees to maintain an action for its recovery. It was held that where no money was advanced by the mortgagee, but the mortgage was given for a debt due by the mortgagor to the mortgagee who, in consideration of getting the mortgage, agreed to release the mortgagor from all personal liability, the plaintiffs who were assignees of the mortgage were not entitled to recover (e). Where however there is evidence of a debt or loan the moneys may be recovered by action although there is no covenant to pay (f).

In a Welsh mortgage from the nature of the contract between the parties the mortgagor incurs no personal obligation to pay the money secured thereby although it was a loan.

If mortgage
was given to
secure a debt
or loan,
action will
lie.

(c) *Jackson v. Yeomans* (1876) 39 U.C.R. 280.

(d) *Jackson v. Yeomans* (1876) 39 U.C.R. 280.

(e) *London Loan Company v. Smyth* (1882) 32 U.C.C.P. 530.

(f) *Yates v. Aston* (1843) 4 Q.B. 182; *Sutton v. Sutton* (1882) 22 Ch. D. 511.

**Statutory
covenant
for payment.**

It is usual to insert in mortgages the following covenant for payment:—

“And the said mortgagor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs, executors, administrators and assigns, in manner following, that is to say: That the said mortgagor, his heirs, executors, administrators or some or one of them shall and will well and truly pay or cause to be paid unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, at the days and times and in the manner above limited for payment thereof, and shall and will in everything well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.”

This form of covenant has been adopted in Ontario by the *Act respecting Short Forms of Mortgages* (g).

Short form.

The equivalent short form is as follows:—

“The said mortgagor covenants with the said mortgagee that the mortgagor will pay the mortgage money and interest and observe the above proviso.”

**Mortgagor
may limit
his liability
to pay.**

A mortgagor may by his covenant restrict his liability as to the amount and as to the terms on which the mortgage may be enforced (h).

In a mortgage for \$3,250, which contained the usual printed short form covenant for payment, the following words were added in writing to the covenant:—

“But before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and the

(g) R.S.O. (1897) c. 126, Schedule B, clause 4. There are similar provisions in Manitoba and British Columbia.

(h) *Wilson v. Fleming* (1893) 24 Ont. 388.

mortgagor shall then be liable only to the amount of \$600 or such lesser sum as will with the net proceeds from the lands make the \$3,250 and interest." The last clause in the mortgage, also added in writing, provided that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600." It was held that the mortgagor was not subject to any liability on the covenant until after the mortgagee should have realized upon the lands and then only to the extent of \$600 (*i*).

In Ontario under section 5 of the *Act respecting Mortgages of Real Estate* (*j*) a covenant to pay on the part of each person who conveys as beneficial owner is implied in all mortgages made after the 1st day of July, 1886. Section 5 is as follows:—

Implied covenant for payment in mortgages made after 1st July, 1886.

5. There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases by virtue of this Act be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:—

(a) In a conveyance by way of mortgage, the following covenants by the person who conveys, and is expressed to convey as beneficial owner, namely:—

For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage;

Good title;

Right to convey;

That, on default, the mortgagee shall have quiet possession of the land;

Free from all incumbrances;

That the mortgagor will execute such further assurances of the said lands as may be requisite;

That the mortgagor has done no act to incumber the land mortgaged;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to the *Act respecting Short Forms of Mortgages*.

The right of a mortgagee to sue for principal or interest

Right to sue in Division Court.

(*i*) *Wilson v. Fleming* (1893) 24 Ont. 388.

(*j*) R.S.O. (1897) c. 121.

(*k*) R.S.O. (1897) c. 60.

in the Division Courts is governed by section 79 of the *Division Courts Act* (k) which is as follows:—

79. (1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400.

(2) Where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may, notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due.

The mortgagee cannot sue for an instalment of interest upon a mortgage, the amount of the instalment being within the jurisdiction of the Division Court, when other instalments are due and the whole amount due exceeds that for which a suit may be brought in the Division Court (l).

Where a mortgage deed contains a covenant for payment of principal and interest on a fixed day the principal and the interest are two distinct debts, and either may be sued for separately from the other (m).

(l) *Re Real Estate Loan Co. v. Guardhouse* (1898) 29 Ont. 602: following *Re Clark v. Barber* (1894) 26 Ont. 47.

(m) *Dickenson v. Harrison* (1817) 4 Price 282; 18 R.C. 474.

SECTION II.

WHO MAY SUE AND BE SUED.

i. *Who may sue.*

The general rule is that only parties to a contract may sue or be sued thereon. But the benefit and in some cases the burden of the covenant may devolve on persons other than the parties to it either by assignment or by operation of law.

Where there is a debt due from the mortgagor to the mortgagee or a loan for which the mortgage has been given, the mortgagee during his lifetime and while he is the holder of the security may maintain an action whether there is a covenant for payment or not; and where there are two or more mortgagees the survivor or survivors of them may sue in like manner for he or they are entitled by law to receive the money and give discharges for the same (*n*).

The executors or administrators of a deceased mortgagee who died entitled to the mortgage money may also sue to recover it as a debt, and the remedies for it devolve upon them by law (*o*).

Although the heirs of the mortgagee are named in the statutory covenant for payment it is improper to make the covenant to them. The personal representatives will not thereby be deprived of their ordinary right to the moneys as being personality or of the right to sue for the moneys in their own names (*p*).

Where there are two or more executors or administrators all may sue; but it is doubtful if one or any number less than all of the surviving executors or administrators may maintain an action on the covenant, although it has

General rule:
only parties
to the con-
tract may
sue or be
sued.

Mortgagee.

Survivor of
two or more
mortgagees.

Executors or
administra-
tors.

Heirs.

One of two
or more
executors.

(*n*) R.S.O. (1897) c. 121, s. 13.

(*o*) R.S.O. (1897) c. 127, s. 4.

(*p*) Leith's Real Property Statutes p. 420.

been held that two of three executors may give a valid discharge (*q*).

One of two or more mortgagees.

But it would appear that one of several mortgagees or one of several executors may bring an action on the covenant if their co-mortgagees or co-executors will not join. In that case the co-mortgagees or co-executors should be made defendants (*r*).

Executors of surviving mortgagee.

In like manner the executors or administrators of the last survivor of two or more joint mortgagees may recover the mortgage moneys by action as they are the persons entitled by law to receive the same. This provision, however, applies only to mortgages made after the 1st day of July, 1886, and only if and so far as a contrary intention is not expressed in the mortgage (*s*).

Assignees.

The assignee of the mortgage security also may sue on the covenant in his own name. The *Ontario Judicature Act* R.S.O. (1897) chapter 51 section 58 sub-section 5 provides as follows:—

(5) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor.

It will be noticed that this section applies to absolute assignments made after the 31st day of December 1897; and it would seem that express notice in writing to the debtor is essential to the validity of the assignment. This enactment corresponds to the English *Judicature Act* 1873, 36 & 37 Vict. chapter 66, s. 25 (6). Prior to this enactment the right of the assignee to sue depended upon

(*q*) *Ex parte Johnson* (1875) 6 P.R. 225.

(*r*) *Luke v. South Kensington Hotel Company* (1879) 11 Ch. D. 121.

(*s*) R.S.O. (1897) c. 121, s. 13.

section 7 of the *Mercantile Amendment Act R.S.O. (1887)* chapter 122 which is as follows:—

7. Every debt and chose in action arising out of contract shall be assignable by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in the action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province.

The repealing act 60 Vict. (Ont.) chapter 15 s. 5 saved the rights of persons claiming under assignments executed before the new act came into force.

The recent enactment does not confer new rights but gives a new mode of enforcing rights under the assignment, and transfers the remedies as well as the rights of the assignor (*t*).

The enactment applies only to absolute assignments; Absolute assignment. but a mortgage of debts due to the mortgagor and, it would seem, a mortgage of a mortgage made in the ordinary form with a proviso for redemption and reassignment upon repayment is "an absolute assignment (not purporting to be by way of charge only)" within the meaning of the act, and the assignee may maintain an action in his own name (*u*).

Legatees and devisees. Legatees or devisees of the mortgage security cannot maintain an action on the covenant for payment of the mortgage moneys as they are not parties to the contract. In general they would require an assignment of the covenant from the executors or administrators of the mortgagee before bringing action.

Where debentures are secured by a trust deed the Trustees. trustees are the proper persons to bring an action; but if they refuse to do so an action may be brought by one of the debenture holders. The suit should be on behalf of the plaintiff and all other debenture holders and the trustees should be defendants. The plaintiff's claim

(*t*) *Walker v. Bradford Old Bank* (1884) 12 Q.B.D. 511.

(*u*) *Durham v. Robertson* [1898] 1 Q.B. 765; *Tancreo v. Delagoa Bay and East Africa Railway* (1889) 23 Q.B.D. 239.

in such an action is that the trusts of the deed be carried into execution (*v*).

Trustees, executors and administrators may sue and be sued under Rule 193 which is as follows:—

193. Trustees, executors and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may at any time order any of them to be made parties in addition to, or in lieu of, the previous parties.

In a suit brought by executors of a mortgagee to foreclose it was held that the heirs of the deceased mortgagee or the persons beneficially entitled under his will were not necessary parties (*w*).

Cestui que trust.

The *cestui que trust* is entitled to bring an action against his trustee and compel him to perform any particular act of duty. Thus, if the legal estate in the hands of the trustee be disturbed by a stranger the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority, may oblige the trustee, on giving him a proper indemnity, to lend his name for asserting the legal right. If the trustee of a covenant, even a voluntary one, will not sue upon it, the *cestui que trust* may compel the trustee on a proper indemnity being given to lend his name to the *cestui que trust*, so as to enable the latter to sue (*x*). In the case of a mortgage made to a mortgagee as trustee for a third person it would seem that in equity the *cestui que trust* may maintain an action on the covenant as well as the trustee (*y*).

Sheriff.

In Ontario under the *Execution Act* (*z*) a sheriff who has taken a mortgage in execution on behalf of a

(*v*) *Troughton v. Binkes* (1801) 6 Ves. 573.

(*w*) *Lawrence v. Humphries* (1865) 11 Gr. 209.

(*x*) *Foley v. Burnell* (1783) 1 B.C.C. 277; *Fletcher v. Fletcher* (1844) 4 Hare 67.

(*y*) *Gandy v. Gandy* (1885) 30 Ch. D. 57.

(*z*) R.S.O. (1897) c. 77, s. 24.

creditor of the mortgagee may maintain an action to recover the mortgage money.

ii. *Who may be sued.*

The mortgagor during his lifetime and whether he remains the owner of the mortgaged property or not continues to be liable for the mortgage indebtedness. Where there are two or more mortgagors both or all may be sued; and if the covenant is several, or joint and several, any one or more may be sued. Whether the covenant is joint or several depends upon the construction of the express terms of the covenant itself, and it may be explained by evidence of the interest of the covenantors in the property or in the moneys advanced, or by other circumstances of the transaction.

One of two or more mortgagors.

If the covenant is a joint covenant the action must be brought against all the covenantors if living. If one of the joint covenantors be dead the action may be brought against the executors or administrators of the deceased covenantor in the same manner as if the covenant had been joint and several and without joining the other covenantors although they may be living (a). If one of the joint covenantors resides out of the jurisdiction the action may be brought against the others who reside within the jurisdiction. (b).

Joint covenant; joint and several covenant.

The statutory covenant for payment is not sufficient to bind the "successors" of the mortgagors; a corporation sole therefore cannot bind its successors by the ordinary covenant for payment (c).

Successors not bound by statutory covenant.

The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage

Trustee of a religious congregation not personally liable on the covenant.

(a) R.S.O. (1897) c. 129, s. 15.

(b) *Wilson Sons & Co. v. Balcarres Brook Steamship Co.* [1893] 1 Q.B. 422; *Robb v. Murray* (1890) 13 P.R. 397.

(c) *Parks v. Bishop of New Westminster* (1897) 33 C.L.J. 302 (B.C.)

with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually (*cc*).

Executors.

The executors or administrators of a mortgagor may be sued under the covenant for payment, and also the heirs; but only to the extent of the property received from the mortgagor at his death.

In addition to the remedies by action on the covenant the mortgagee may prove his claim against the mortgagor in bankruptcy or insolvency proceedings or in administration proceedings undertaken by the court, and he may follow the assets in the hands of the legatees or devisees.

A mortgagor trustee not personally liable.

As a general rule a trustee executing a mortgage will not be personally liable to repay the debt. And where a person holding land as a trustee, at the request of beneficial owners and without any consideration to him, executed a mortgage on land for the benefit of the owners, and the mortgage deed contained without his knowledge a covenant to pay the mortgage debt, it was held that the covenant was not enforceable against the mortgagor personally even by the assignee of the mortgage for value without notice; and that his remedy was restricted to foreclosure proceedings against the lands (*d*). Likewise a covenant in a mortgage deed to pay the mortgage money out of a specific fund is not sufficient to fix the covenantor with personal liability (*e*).

Covenant by married woman.

If the mortgagor is a married woman and the mortgage deed contains a covenant by her to pay the principal and interest, she is not thereby made personally liable, but the covenant operates as a contract binding upon her general separate estate in the manner provided by the *Married Women's Property Act* (*f*).

(*cc*) *Beaty v. Gregory* (1897) 24 Ont. App. 325. See also *Conservators of the River Tone v. Ash* (1829) 10 B. & C. 349; R.S.O. (1897) c. 307.

(*d*) *Patterson v. McLean* (1891) 21 Ont. 221.

(*e*) *Matthew v. Blackmore* (1856) 1 H. & N. 762.

(*f*) R.S.O. (1897) c. 163.

By that act it is enacted as follows:—

3. (1) A married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) Every contract entered into by a married woman prior to the 13th day of April, 1897, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn.

(4) Every contract entered into by a married woman prior to the said 13th day of April, 1897, with respect to and to bind her separate property, shall bind, not only the separate property which she was possessed of or entitled to at the date of the contract, but also all separate property which she has since acquired or may hereafter acquire.

4. (1) Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent:

(a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had any separate property at the time when such contract was entered into, or subsequently;

(b) Shall bind all separate property which she may at the time or thereafter possess or be entitled to; and

(c) Shall also be enforceable by process of law against all property which she may thereafter while discovered possess or be entitled to.

(2) Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating (g).

A married woman is not liable on the covenant for payment unless it be shewn that the property mortgaged was her separate property. Thus where the married woman was merely a trustee for her husband of property purchased by him and conveyed to her and she joined with her husband in creating a mortgage upon it, she was held

Married
woman's
liability.

(g) See as to former and present acts relating to married women's property Holmested & Langton's Ont. Jud. Act, 2nd ed., 331 *et seq.*

not liable on the covenant for payment although the mortgagee had no knowledge of her position (gg).

Mortgagor
after parting
with equity of
redemption.

The mortgagor continues to be personally liable under his covenant although he has conveyed away the equity of redemption in the land. In such a case the mortgagee will be entitled to judgment on the covenant only on the term that upon receiving payment of the amount due from the mortgagor he shall reconvey the property to him subject to the existing equity of redemption. The original mortgagor will thus become a mortgagee of the property (h).

Purchaser of
equity of
redemption
not liable.

The burden of the covenant to pay the mortgage money does not run with the land and the purchaser of the equity of redemption from the mortgagor will not be liable to the mortgagee; there is no privity of contract between them (i).

Privity of
contract.

Although a purchaser from the mortgagor of the equity of redemption covenants with him to pay off the mortgage debt, this affords no ground, owing to the want of privity, for the mortgagee proceeding against the purchaser either at law or in equity to compel him to perform his covenant (j).

Mortgagor
entitled to
covenant of
indemnity
from pur-
chaser of
equity of
redemption.

Although the purchaser of the equity of redemption is not directly liable to the mortgagee to pay the mortgage debt, there is an implied obligation upon his part to indemnify the mortgagor against the mortgage debt, and he may be required to give a covenant for such indemnity (k).

In the Northwest Territories (l) there is an implied covenant in every instrument transferring land subject to a mortgage that the purchaser will pay the mortgage moneys and indemnify his grantor.

(gg) *Gordon v. Warren* (1897) 24 Ont. App. 44.

(h) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636.

(i) *Frontenac Loan and Investment Society v. Hysop* (1892) 21 Ont. 577; *Canada Land and National Investment Company v. Shaver* (1895) 22 Ont. App. 377.

(j) *Clarkson v. Scott* (1878) 25 Gr. 373.

(k) *Bridgman v. Daw* (1892) 40 W.R. 253; *Waring v. Ward* (1802) 7 Ves. 332; *Jones v. Kearney* (1842) 1 Dr. & War. 134; *Thompson v. Wilkes* (1856) 5 Gr. 594; *Canavan v. Meek* (1883) 2 Ont. 636; *Boyd v. Johnston* (1890) 19 Ont. 598.

(l) 57 & 58 Vict. (D.) (1894) c. 28, s. 65.

In Manitoba a similar provision is in force (*m*).

A married woman, however, who purchases mortgaged lands is not under any obligation to indemnify her grantor, unless she expressly undertakes to do so (*n*). Married woman.

But where mortgaged lands are conveyed to a married woman, and the conveyance although not executed by her contains a recital that she shall pay off the mortgage debt, in such case if she takes possession and enjoys the benefits without disclaiming she will be bound to perform the obligation (*o*).

There may, however, be an express agreement between the mortgagor and the purchaser of the equity of redemption that the latter shall not be liable for such indemnity, and parol evidence of such an agreement is admissible (*p*).

The equitable obligation of a purchaser of land which is subject to a mortgage to indemnify the mortgagor against the mortgage debt may be assigned by the latter to the mortgagee who may maintain an action thereon against the purchaser for recovery of the mortgage moneys (*q*). Obligation to indemnify may be assigned to mortgagee.

Where lands held in trust are mortgaged by the trustee the mortgagee is not entitled to the benefit of any equities or rights arising either under express contract or upon equitable principles entitling the trustee to indemnity from his *cestui que trust* (*r*).

(*m*) R.S. Man. (1891) c. 133, s. 81.

(*n*) *McMichael v. Wilkie* (1891) 18 Ont. App. 464.

(*o*) *Small v. Thompson* (1897) 28 S.C.R. 219.

(*p*) *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664.

(*q*) *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664; *Campbell v. Morrison* (1897) 24 Ont. App. 224; affirmed in the Supreme Court of Canada *sub. nom. Maloney v. Campbell* 28 S.C.R. 228.

(*r*) *Williams v. Balfour* (1890) 18 S.C.R. 472.

SECTION III.

WHEN THE RIGHT TO SUE ARISES.

The right of the mortgagee to recover the mortgage moneys arises when they become due according to the contract. If there is a covenant to pay on a certain day there is an implied obligation not to sue before that day (*s*). When a day certain is named for payment the debtor has the whole of that day; and an action cannot be brought until the next day. There is an apparent exception where the debtor has made an assignment for the benefit of creditors under the *Act respecting Assignments* (*t*). In that case the creditor may prove his claim and receive his dividend before the money becomes due.

Demand not necessary unless required by the terms of the contract.

Verbal demand sufficient.

Place of payment.

A demand of payment is in general not necessary before bringing action unless required by the terms of the contract. Even where the moneys are payable on demand no demand need be made on the principal debtor; but otherwise if the action is against ~~the~~ *the party* (*u*).

In case a demand is required by the terms of the contract, a verbal demand is sufficient unless a demand in writing is expressly stipulated for. If a demand is left for the debtor at his place of business there will be no default until the debtor shall have had a reasonable opportunity of receiving the notice (*v*).

Where by the terms of the mortgage contract a place is appointed for payment, a demand must be made at that place before an action may be brought (*w*). In case no place is named for payment it is the duty of the mortgagor to seek out the mortgagee and pay him, unless the

(*s*) *Bolton v. Buckenham* [1891] 1 Q.B. 278.

(*t*) R.S.O. (1897) c. 147, s. 21, sub-s. 4.

(*u*) *In re J. Brown's Estate* [1893] 2 Ch. 300.

(*v*) *Massey v. Sladen* (1868) L.R. 4 Ex. 13.

(*w*) *Thorn v. City Rice Mills* (1889) 40 Ch. D. 357.

mortgagee shall have gone abroad after the making of the mortgage; but if the mortgagee was abroad when the contract was made the mortgagor must pay him abroad (*x*).

Where the principal or interest is payable in instalments it has been held that upon default in payment by the mortgagor of any instalment of principal or interest the mortgagee has a right, independently of any express proviso in the mortgage to that effect, to call in the whole principal and interest and foreclose (*y*). But this right may be qualified by agreement. Thus where there was a stipulation that in default of payment of any instalment of interest for six months the whole principal should become due, it was held that a suit to foreclose could not be brought until after the six months had expired (*z*). But although an action for foreclosure or sale may be brought, it seems that an action on the covenant would not lie for the whole principal and interest on default in payment of any instalment, in the absence of an express agreement to that effect.

It is usual to insert a clause in the mortgage providing for acceleration on default. The proviso in the *Act respecting Short Forms of Mortgages* (*a*) is as follows:—

16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured or mentioned, or intended so to be, or any part thereof, then and in such case the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner and with the like consequences and effects, to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs or assigns, shall on payment of all arrears under these presents with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered, or within such time as, by the practice of the High Court, relief therein could be

(*x*) *Haldane v. Johnson* (1853) 8 Exch. 689; *Bell & Co. v. Antwerp, London & Brazil Line* [1891] 1 Q.B. 103; *The Eider* [1893] P. 119.

(*y*) *Canada Settlers' Loan Company v. Nicholles* (1896) 5 B.C.R. 41; *Cameron v. McRae* (1852) 3 Gr. 311.

(*z*) *Parker v. Vine Growers' Association* (1876) 23 Gr. 179.

(*a*) R.S.O. (1897) c. 126, Schedule B, clause 16. In Manitoba and British Columbia there are identical statutory provisions.

Acceleration
on default.

Foreclosure
will lie.

But not an
action on the
covenant.

Acceleration
clause.

obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

The short form which is declared to be equivalent to the foregoing proviso is as follows:—

16. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

It will be observed that the statutory form provides for acceleration only upon default in payment of interest. If the principal is payable in instalments a special provision may be inserted that the whole principal sum shall become due and payable upon default in payment of any instalment of principal.

Acceleration
clause not
in the
nature of a
penalty.

It was formerly contended, and in one case held that a proviso of this kind was in the nature of a penalty against which equity would relieve (b). But it is now well settled that such a provision is to be regarded as the contract of the parties and not in the nature of a penalty against which relief will be granted (c).

In *Sterne v. Beck* (d) Knight Bruce, L.J. said:—

"The deed provided for payment of the debt by instalments . . . and further provided that in a certain event payment of the debt should be accelerated. It did not provide that the amount payable should be increased, but only provided that instead of being paid at future periods with interest up to these periods it should become payable at once with interest up to that time. To a proviso of such a nature none of the principles of equity relating to relief in the case of penalties are in my opinion applicable."

Before
judgment
mortgagor
may be
relieved on
payment
of amount
then due.

But at any time before judgment has been recovered the mortgagor under the terms of the covenant on payment of arrears and costs may be relieved from the consequences of his default.

After judgment has been recovered in an action on the covenant alone relief will not be granted. Thus, where by virtue of an acceleration clause the whole of the mortgage

(b) *Knapp v. Cameron* (1858) 6 Gr. 559.

(c) *Tylee v. Hinton* (1878) 3 Ont. App. 53 per Moss, C.J.O., at p. 60; *Graham v. Ross* (1884) 6 Ont. 154; *Sterne v. Beck* (1863) 1 DeG. J. & S. 595; *Wilson v. Campbell* (1893) 15 P.R. 254; *Leeds and Hanley Theatre of Varieties v. Broadbent* [1898] 1 Ch. 343, C.A.

(d) (1863) 1 DeG. J. & S. 595, at p. 600.

money has become due by default of payment of interest, and judgment has been recovered for the whole by the mortgagee against the mortgagor in an action solely upon the covenant for payment contained in the mortgage deed the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside (e).

In *Wilson v. Campbell* (f) Boyd, C. said :—

"I may note that I do not decide upon what might be done before judgment obtained upon the covenant. That recovery changes the position of the parties—the mortgage passes into a security of record—*transit in rem judicatum*—and the amount then due and payable is no longer secured by the mortgage (''by these presents'' as expressed in the statute) but by the judgment of the Court. But the scope and meaning of the extension of the acceleration claim as given in the R.S.O. have not yet been exhaustively considered."

On the other hand, actions of foreclosure or sale or for the recovery of possession are governed by the Rules. In such cases the defendant before judgment may have the action dismissed and after judgment may have proceedings stayed upon paying into court the amount then due for principal, interest and costs (g).

Even in an action of foreclosure where the acceleration depended not on default in payment of interest but on default in building a house within the time stipulated for the court refused to interfere and granted judgment of foreclosure (h). In that case the defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to build a house on the land within one year, and there was a proviso that the mortgage should immediately become due and payable after default being made in building the house within the time mentioned. No default

Otherwise in
actions of
foreclosure
or sale or for
possession.

(e) *Wilson v. Campbell* (1893) 15 P.R. 254.

(f) (1893) 15 P.R. 254 at p. 258.

(g) Ontario Consolidated Rules 388 and 389. The corresponding rules in Manitoba are 270 and 271. It would seem that these rules apply even where there is an accelerating clause in the mortgage: *Gemmell v. Burn* (1878) 7 P.R. 381; *Knapp v. Cameron* (1858) 6 Gr. 559.

(h) *Graham v. Ross* (1883) 6 Ont. 154.

occurred in payment of the mortgage money, but the house was not built until about a month after the expiry of the first year. It was held that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure.

Relief may be granted against forfeiture for non-payment of rent, and in certain cases for neglect to insure, but no case appears in which relief has been given against such default as that just mentioned.

Form of acceleration clause.

It is not necessary that the acceleration clause should be in the words of the statute. Any form of words which expresses the agreement of the parties will be sufficient. If the statutory form is varied and there is no express provision for relief to the mortgagor, the mortgagee may call in the whole amount of the mortgage moneys and maintain an action on the covenant therefor (i).

"Punctually paid."

Where a mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed, "if in the meantime every half-yearly payment of interest shall be punctually paid," it was held that payment "punctually" meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment (j).

But where a mortgage payable in ten years contained a proviso that if the mortgagor mortgaged or otherwise incumbered the premises or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable, the court held that an assignment in insolvency, though voluntary, was not such an incumbering

(i) *Graham v. Ross* (1883) 6 Ont. 154; *Leeds and Hanley Theatre of Varieties v. Broadbent* [1898] 1 Ch. 343, C.A.

(j) *Leeds and Hanley Theatre of Varieties v. Broadbent* [1898] 1 Ch. 343, C.A.

of the estate as entitled the mortgagee to call for the mortgage money (*k*).

Where the principle¹ has become due by virtue of the mortgage contract, on default in payment of interest, the mortgagee is not bound to sue for the whole accelerated sum. He may if he chooses seek to recover only the amount that has matured.

Mortgagee
not bound to
sue for the
whole on
default in
payment of
part.

A mortgagor may pay off the mortgage debt after maturity of the mortgage without giving six months' notice. But a mortgagor cannot take advantage of his own default in payment before maturity and claim the right to pay off the whole mortgage debt (*l*).

Where, however, a mortgagee takes proceedings to enforce his security he cannot refuse to accept payment of the whole amount of principal and interest, even although part of it has not matured. But if his proceedings are confined to protecting his security he cannot be compelled to accept payment of moneys not yet due, as the right to accelerate payment for default is at the option of the mortgagee (*m*).

But if he
claims all
he must
accept all.

After a foreclosure action has been commenced it is improper for the plaintiff to bring a second action for a subsequently accruing instalment of principal or interest so long as the first action is pending (*n*).

By section 31 of the *Act respecting Mortgages of Real Estate* (*o*) it is provided that where pursuant to any condition or proviso in a mortgage, a demand or notice has been given requiring payment or declaring an intention to proceed to exercise the power of sale contained in the mortgage, no further proceeding shall be taken, and no action shall be brought to enforce the mortgage until after

Concurrent
proceedings.

(*k*) *McKay v. McFarlane* (1872) 19 Gr. 345.

(*l*) R.S.O. (1897) c. 121, s. 17.

(*m*) *Ex parte Ellis* [1898] 2 Q.B. 79; *Ex parte Wickens* [1898] 1 Q.B. 543; *Wickens v. Shuckburgh* (1898) 78 L.T. 213.

(*n*) See *Earl Poulett v. Viscount Hill* [1893] 1 Ch. 277; 62 L.J. Ch. 466.

(*o*) R.S.O. (1897) c. 121.

the lapse of the time after which, according to the demand or notice, payment is to be made or the power of sale is to be exercised or proceeded under, except by leave of a judge (*p*).

In *Perry v. Perry* (*q*) it was held that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute, in order to fulfil the very words of it, that one of the acts should be prior to the other.

And where after the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed the plaintiff, without the leave required by the section, served notice of exercising the power of sale, but before the hearing of the motion gave notice of abandonment of his notice of sale and of all costs in respect thereof, it was held that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and unless the defendant was willing to release the plaintiff he was bound by the notice, and the motion for judgment could not be entertained; but the motion was allowed to stand over until after the expiration of the thirty days mentioned in the notice (*r*).

Publication
of an adver-
tisement is a
"proceed-
ing."

The publication of an advertisement for sale is a "proceeding" within the meaning of the act (*s*).

A surety against whom a judgment has been recovered, which it has been agreed shall stand as security for the payment of the deficiency, is entitled to have the security realized before he can be called on to pay anything (*t*).

(*p*) *Perry v. Perry* (1884) 10 P.R. 275.

(*q*) (1884) 10 P.R. 275.

(*r*) *Lyon v. Ryerson* (1897) 17 P.R. 516.

(*s*) *Smith v. Brown* (1890) 20 Ont. 165; see also *Neil v. Almond* (1898) 29 Ont. 63.

(*t*) *Teeter v. St. John* (1863) 10 Gr. 85.

SECTION IV.

WHAT THE MORTGAGEE IS ENTITLED TO RECOVER.

Under the covenant for payment the mortgagee is entitled to recover the principal and interest, if any, and in certain cases the costs and expenses which he has properly incurred in connection with the security.

Only the amount actually advanced can be recovered notwithstanding that a larger amount appears in the mortgage deed; and parol evidence is admissible to shew that a less sum was advanced than that mentioned in the mortgage deed (*u*).

But the parties may stipulate that the mortgage shall be redeemable only on payment of a larger amount than that actually advanced; or that a smaller sum if paid at an earlier date shall be accepted in full, and such stipulations will be enforced (*v*). But in the case of an expectant heir such a stipulation would not be enforced (*w*).

Where a propersalehasbeenmadeand theamountrealized is not sufficient to satisfy the mortgage moneys and costs of sale, the deficiency may be recovered from the mortgagor.

A mortgagee after a *bona fide* sale may sue on the covenant either a surety or the original debtor; he may not sue unless the sale has been *bona fide*. Thus where the sale was intended to and did cut out the equity of redemption, while payment of the debt was still intended to be enforced, the mortgagee having deprived himself of the power to reconvey was restrained from suing on the covenant (*x*).

And where at a sale of mortgaged property held pursuant to an order for foreclosure and sale the mortgagee became the purchaser for a sum less than the amount of the mortgage, and then conveyed the property to a third party and afterwards sued on a bond collateral to the mortgage to re-

Amount
actually
advanced.

Deficiency
on sale.

Sale not
bona fide.

Sale under
order of
court.

(*u*) *Mainland v. Upjohn* (1889) 41 Ch. D. 126.

(*v*) *Webster v. Cook* (1867) 2 Ch. 542.

(*w*) *Beynon v. Cook* (1875) 10 Ch. 389.

(*x*) *Crotty v. Taylor* (1892) 8 Man. R. 188.

cover the balance due after crediting the net proceeds of the sale, it was held that the mortgagee was entitled to recover (*y*). But where, after the mortgagor had assigned his equity of redemption, the mortgagee with the concurrence of the assignee by sale and transfer of the mortgaged premises put it out of his power to reconvey on redemption by the mortgagor, it was held that he could not call upon the mortgagor for payment of any deficiency (*z*).

Bonus or
commission
not recover-
able ;

but may be
deducted at
time of loan.

A mortgagee will not be allowed to recover a bonus or commission for making the loan even although there is an express stipulation that he shall be entitled thereto. For this would have the effect of giving the mortgagee a collateral advantage and of clogging the equity of redemption (*a*). But if in the negotiations for a loan to be secured by a mortgage the mortgagee stipulates for a bonus or special commission or other charge in consideration of advancing the money and in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterwards paid and settled; but otherwise such bonus or special advantage cannot be recovered or allowed in equity (*b*).

Where the mortgage debt is payable in lawful money of the United States, the mortgagee is entitled at his option to claim the amount in the current money of that country, or its equivalent in Canadian currency at the time of default in payment (*c*).

(*y*) *Kenny v. Chisholm* (1883) 19 N.S.R. 497; 8 C.L.T. 62; affirmed on appeal to the Supreme Court of Canada 16th Feb. 1886.

(*z*) *Burnham v. Galt* (1869) 16 Gr. 417.

(*a*) *Barrett v. Hartley* (1866) L.R. 2 Eq. 789; *Broad v. Selfe* (1863) 9 Jur. N.S. 885; *James v. Kerr* (1889) 40 Ch. D. 449.

(*b*) *Phillipps v. Prout* (1898) 12 Man. R. 143, following *Potter v. Edwards* (1857) 26 L.J. Ch. 468; *Mainland v. Upjohn* (1889) 41 Ch. D. 126, and distinguishing *James v. Kerr* (1889) 40 Ch. D. 449; *Eyre v. Wynn-McKenzie* [1894] 1 Ch. 218; [1896] 1 Ch. 135; *Field v. Hopkins* (1890) 44 Ch. D. 524.

(*c*) *Morrell v. Ward* (1863) 10 Gr. 231; *Crawford v. Beard* (1864) 14 U.C.C.P. 87.

CHAPTER VIII.

BAR OF ACTION ON THE COVENANT BY ACTS OF THE PARTIES.

The mortgagee's right of action on the covenant for payment may be barred or extinguished by the acts of the parties themselves or by statute.

The right is extinguished by payment of what is due; **Payment.** and if the mortgagee obtain payment out of the lands he cannot afterwards pursue his right under the covenant for payment. But if he receive only part payment he may proceed to foreclose or sell; or he may recover the unpaid balance by action. **Accord and satisfaction** is **Accord and satisfaction.** equivalent to payment and extinguishes the debt.

A release of the mortgage debt if made under seal is **Release.** binding even without consideration (*a*). Delivery of the mortgage deed by the mortgagor to the mortgagee with the intention of releasing the debt does not in law release it, but it would be effectual if at the time the mortgagee declared himself a trustee of the mortgaged property for the mortgagor (*b*).

Where the mortgagee acquires the equity of redemption or where the owner of the equity of redemption takes an assignment of the mortgage, then in the absence of express stipulation binding on the mortgagor the right of action against the mortgagor on the covenant to pay is extinguished (*c*). The foundation of this rule would seem to be, not that there is a merger of the two estates as is sometimes stated, but that the purchaser from the mortgagor of the equity of redemption is under an implied

Right of
action on
covenant
extinguished
if mortgagee
acquires
equity of
redemption.

(*a*) *Foakes v. Beer* (1884) 9 App. Cas. 605.

(*b*) *In re Hancock* (1888) 57 L.J. Ch. 793; *Edwards v. Walters* [1896] 1 Ch. 157.

(*c*) *North of Scotland Mortgage Co. v. Udell* (1882) 46 U.C.R. 511; *British and Canadian Loan Co. v. Williams* (1888) 15 Ont. 366; *Forrest v. Gibson* (1890) 6 Man. R. 612.

obligation to indemnify him against the incumbrance (*d*). Thus a mortgagee who has foreclosed the equity of redemption and so united the two estates in his own person may nevertheless sue the mortgagor on his covenant for payment. In such a case the effect of bringing an action on the covenant will be to let in the mortgagor to redeem if he chooses to avail himself of that right (*f*). Where the mortgagee acquires the equity of redemption the two estates may become merged, but not as against an intervening incumbrancer (*g*).

Where the mortgagee purchases the equity of redemption at a sale thereof under an execution this will have the effect of extinguishing the mortgage debt, and the mortgagee will be compelled to give a release to the mortgagor. This is provided by section 32 of the *Execution Act* (*h*) which is as follows:—

32. A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place has issued), may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser; but in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged lands.

In New Brunswick it has been held that if the mortgagee purchases the equity of redemption at a sheriff's sale, the mortgage debt is extinguished (*i*).

Bankruptcy. If the mortgagor has become bankrupt and received his discharge, the mortgage debt is thereby extinguished; but that does not discharge the surety (*j*). The court under the *Insolvent Act* of 1875 would not order execution

(*d*) *British and Canadian Loan Co. v. Williams* (1888) 15 Ont. 366.

(*f*) *Pegg v. Holson* (1887) 14 Ont. 272.

(*g*) R.S.O. (1897) c. 121, s. 8.

(*h*) R.S.O. (1897) c. 77.

(*i*) *McPhelim v. Weldon* (1862) 5 All. (New Bruns.) 358.

(*j*) *In re London Chartered Bank of Australia* [1893] 3 Ch. 540.

against an insolvent mortgagor whose estate after he had obtained a discharge had been reconveyed to him; although it might be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption (k).

The covenant of the mortgagor for payment if according to the usual statutory form is absolute at law; but in equity it is regarded as conditional, and the mortgagor is entitled on payment of the amount due to a reconveyance of the mortgaged property (l). Even if the mortgagee has obtained a final order of foreclosure he may still sue on the covenant for payment if he is in a position to reconvey the estate (m). But although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines to receive the money the court would restrain him from afterwards suing for the mortgage debt (n). If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if at the time of bringing the action he has paid off the mortgage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing (o).

But if the mortgagee by his dealings with the property, except a sale under his power or other act authorized by the mortgagor, has become unable without the default of the mortgagor to reconvey the estate he will lose his right of action on the covenant for payment (p). And so where the mortgagee with the concurrence of the person who

Recovery is
conditional
on reconvey-
ance.

Foreclosure
not a bar if
mortgagee
can
reconvey.

Inability to
reconvey a
bar to action
on the
covenant.

(k) *Smith v. Elliott* (1878) 25 Gr. 598.

(l) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636.

(m) *Bank of Toronto v. Irwin* (1881) 28 Gr. 397.

(n) *Munsen v. Hauss* (1875) 22 Gr. 279.

(o) *Munsen v. Hauss* (1875) 22 Gr. 279.

(p) *Palmer v. Hendrie* (1859) 27 Beav. 349; *Perry v. Barker* (1806) 13 Ves. 198; *Walker v. Jones* (1866) L.R. 1 P.C. 50; *British and Canadian Loan Co. v. Williams* (1888) 15 Ont. 366.

after the mortgage was given purchased the equity of redemption, but without the concurrence of the mortgagor, made a sale of the lands, it was held that the mortgagee could not recover the deficiency from the mortgagor (*q*).

Release of part of mortgaged premises.

And if a mortgagee releases part of the mortgaged premises without the consent of the mortgagor and so becomes unable to reconvey, he cannot afterwards sue on the covenant for payment. Where the mortgagee and mortgagor sold and conveyed part of the mortgaged property, without the concurrence of a person to whom subsequently to the mortgage the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee, and the mortgagee covenanted for freedom from incumbrances, it was held that the mortgagee having thereby put it out of his power to reconvey the whole of the mortgaged property could not call on the owner of the remaining portion for payment of the balance of the mortgage money (*r*). This rule does not apply where the sale is under a power contained in the mortgage. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was not a party (*s*).

Where the mortgagee's right to claim a lien on the unsold portion has been put an end to, it is not revived by his obtaining two years afterwards the consent of the first purchaser to a reconveyance on payment of the mortgage money (*t*).

But where a mortgagor conveyed part of the mortgaged property to a purchaser, and gave a covenant against incumbrances, and the mortgagee subsequently released the part so sold from his mortgage, it was held that as the release was in accordance with the mortgagor's own obligation as to that part it did not affect the mort-

(*q*) *British and Canadian Loan Co. v. Williams* (1888) 15 Ont. 366; *Palmer v. Hendrie* (1859) 27 Beav. 349.

(*r*) *Gowland v. Garbutt* (1867) 13 Gr. 578.

(*s*) *Gowland v. Garbutt* (1867) 13 Gr. 578.

(*t*) *Gowland v. Garbutt* (1867) 13 Gr. 578; see also *Guthrie v. Shields* 13 Gr. 584.

gagee's own right to recover the mortgage debt, or his lien on the rest of the mortgaged property (*u*). And so where the mortgagee's inability to reconvey arises from any act authorized by the mortgagor or from his acquiescence or default, the action on the covenant will not be barred. Thus where the mortgagee sells the whole or part of the lands, either under the power of sale contained in the mortgage or with the concurrence of the mortgagor at the time of sale, he will have an action for the deficiency (*v*).

Where the mortgagor has conveyed away his equity of redemption he may be discharged from liability to pay under the covenant for payment if the mortgagee deals with the purchaser of the equity of redemption to his prejudice (*w*). Thus in *Trust and Loan Company v. McKenzie* (*x*), which was an action on the covenant for payment, the mortgagees entered into an agreement with one Treblecock, the then owner of the equity of redemption, to extend the time for payment in consideration of his agreeing to pay the mortgage debt at an increased rate of interest. MacLennan, J. A., in delivering the judgment of the court thus stated the effect of such an arrangement:—

"But being the owner of the land, such an agreement, without some stipulation to the contrary, would give Treblecock a right against the plaintiffs and all the world to be free from foreclosure proceedings until the extinction of the extended time for payment. Therefore if McKenzie (the mortgagor) being sued on his covenant and being compelled to pay, and having obtained a reconveyance or assignment of the mortgage, according to his undoubted rights, sought to obtain repayment by suit against the mortgaged lands, he would be met by the agreement for an extension of time made between the plaintiffs and Treblecock. By agreement between the mortgagees and the owner, the land has been tied up for two years, and the mortgagor's right to resort to the land for indemnity has been destroyed. His right was a right to immediate indemnity, and

Action
barred by
mortgagee's
dealings with
purchaser
of equity of
redemption.

(*u*) *Crawford v. Armour* (1867) 13 Gr. 576.

(*v*) *Rudge v. Richens* (1873) L.R. 8 C.P. 358; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636; *Gowland v. Garbutt* (1867) 13 Gr. 578; *In re Burrell, Burrell v. Smith* (1869) L.R. 7 Eq. 399.

(*w*) *Mathers v. Helliwell* (1863) 10 Gr. 172; *Aldous v. Hicks* (1891) 21 Ont. 95; *Trust and Loan v. McKenzie* (1896) 23 Ont. App. 167; *McCuaig v. Barber* (1898) 29 S.C.R. 126.

(*x*) (1896) 23 Ont. App. 167.

that right is now gone by the act of the mortgagee. The mortgagee has, therefore, by his agreement with the present owner, made his mortgage unredeemable by the mortgagor according to the terms, and the effect of that must be to discharge the mortgagor from liability altogether. The mortgagor's liability on his covenant and his right to have the mortgage estate restored to him upon payment are reciprocal, and if the mortgagee cannot restore the estate in its integrity save so far as any impairment was warranted by the terms of the mortgage itself, such as a sale of part of the land under a power, etc., then he cannot enforce the debtor's covenant, his liability is gone: *Lockhart v. Hardy* (1846) 9 Beav. 349; *Palmer v. Hendrie* (1859) 27 Beav. 349; S.C. 28 Beav. 341; *Rudge v. Richens* (1873) L.R. 8 C.P. 358; *Walker v. Jones* (1865) L.R. 1 P.C. 50; S.C. 3 Moo. P.C.N.S. 397; Fisher's Law of Mortgage, 4th ed. p. 962; Coote's Law of Mortgage 5th ed. p. 792."

Reservation
of rights.

But if in such an agreement to extend the time for payment the rights of the mortgagor are expressly reserved he will not be discharged (*y*).

And so where the dealings do not amount to a new contract and there is no binding agreement to extend the time for payment the right of action will not be impaired (*z*).

In *McCuaig v. Barber* (*zz*), which was an action on the covenant for payment, a mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage, which he assigned to the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser of the equity the benefit of similar covenants from sub-purchasers, and agreed to exhaust her remedies against the latter before suing the purchaser. It was held that the mortgagee being the sole owner of the covenant of the purchaser of the equity with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and the purchaser. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

(*y*) *Trust and Loan Co. v. McKenzie* (1896) 23 Ont. App. 167.

(*z*) *Aldous v. Hicks* (1891) 21 Ont. 95.

(*zz*) (1898) 29 S.C.R. 126.

The right of the mortgagor to be discharged in such cases is sometimes grounded on the law of principal and surety. It is said that the mortgagor after parting with the equity of redemption is in the position of a surety for the purchaser who as between themselves is primarily liable for the mortgage debt. Thus in *Muttlebury v. Taylor* (a) Boyd, C. expresses this view as follows:—

"I proceeded upon the law as enunciated in *Blackley v. Kenny* (b) which in no wise conflicts with what was decided in *Aldous v. Hicks* (c). Both cases recognize the law to be that the purchaser of an equity of redemption becomes the principal for the payment of the mortgage debt, and that any dealing between the mortgagee and the purchaser which prejudicially affects the terms of the original contract for payment contained in the mortgage will discharge the mortgagor as being in the circumstances merely a surety for the debt."

In *Trust and Loan Company v. McKenzie* (d) and in *McCuaig v. Barber* (e) it would seem that the right is put on different grounds. In the former of these two cases MacLennan, J.A. said:—

"There is no doubt that when mortgaged land is sold by a mortgagor subject to a mortgage a sort of suretyship results, but it is altogether between the mortgagor and his vendee. The vendee is the person who as between them ought to pay, the debt is now his debt, and the mortgagor is his surety. But the mortgagee's position has not been changed. The mortgagor is the only debtor, and the land alone is still his only security. The expression "principal debtor" used in cases of suretyship imports that there is another debtor, namely, the surety.

The present case is therefore not a case of suretyship at all within the decisions as to discharge of surety by dealings without his consent between the creditor and the principal debtor. It is really only a case of indemnity."

And again:—

"But even if McKenzie could be regarded as a surety before and at the time Treblecock entered into this agreement, I should have been of opinion that the reservation of remedies was sufficient and effectual to prevent the discharge of the mortgagor."

The foundation of the mortgagor's right to be discharged as gathered from these cases may be stated as follows:—

The mortgagee's right to sue on the covenant and the mort-

Mortgagor
as surety.

True ground
is that
mortgagee
is unable to
restore the
estate
unimpaired.

(a) (1892) 22 Ont. 312 at p. 315.

(b) (No. 2) (1889) 19 Ont. 169; 18 Ont. App. 135.

(c) (1891) 21 Ont. 95.

(d) (1896) 23 Ont. App. 167.

(e) (1898) 29 S.C.R. 126.

gagor's right to have the mortgaged estate restored to him on payment, are reciprocal, and if the mortgagee has by his dealings divested himself of the power to restore the estate to the mortgagor unimpaired, the liability of the mortgagor on the covenant is at an end.

The consideration of the mortgagee's right of action on a covenant by a surety for the mortgage debt belongs more properly to the general law of principal and surety and need not be discussed here at length.

Alteration of contract.

Any agreement between the mortgagee and the principal debtor whereby the terms of the original contract are materially altered without the consent of the surety will have the effect of discharging the surety unless it is manifest that the alteration of the terms is beneficial to him (*f*).

Extending time without reservation of rights.

Thus a binding agreement made with the principal debtor, without the surety's consent, to extend the time for payment operates as a discharge of the surety unless the remedies against the surety are expressly reserved (*g*).

Mortgagee bound if he is aware of suretyship at the time of the contract; or if he becomes aware of it afterwards.

If the mortgagee is aware that one of the covenantors is a surety for the other, although not expressed to be a surety, the mortgagee is affected with all equities in favour of the surety (*h*). And this is so if the mortgagee becomes aware of the relationship after the contract is made (*i*).

And where in the original contract the two covenantors are principal debtors but subsequently agree as between themselves that one shall be surety for the other, the creditor is bound from the time he becomes aware of the new relationship to treat the surety as such (*j*).

(*f*) *Newton v. Chorlton* (1853) 10 Hare 646.

(*g*) *Bolton v. Buckenham* [1891] 1 Q.B. 278; *Owen v. Homan* (1853) 4 H.L.C. 997.

(*h*) *Pooley v. Harradine* (1857) 7 E. & B. 431.

(*i*) *Hollier v. Eyre* (1842) 9 Cl. & F. 1; *Liquidators of Overend & Co. v. Liquidators of Oriental Financial Corporation* (1874) 7 Ch. 142; 7 H.L. 348; *Duncan v. North and South Wales Bank* (1880) 6 App. Cas. 1.

(*j*) *Oakeley v. Pasheller* (1836) 4 Cl. & F. 207; 10 Bli. N.S. 548; *Maingay v. Lewis* (1870) I.R. 5 C.L. 229; *Rouse v. Bradford Banking Co.* [1894] 2 Ch. 32; [1894] App. Cas. 586, overruling *Swire v. Redman* (1876) 1 Q.B.D. 536.

Where a surety covenants to pay a debt and also mortgages property of his own to secure it, any conduct on the part of the mortgagee which will discharge the surety's personal liability will also discharge the mortgage security (*k*).

Whatever has the effect of discharging the principal debtor will discharge the surety; and the creditor cannot reserve his rights against the surety if he releases the principal debtor (*l*).

It may be noticed that in the Province of Manitoba the giving time to a principal debtor or dealing with or altering the security held by the principal creditor shall not of itself discharge a surety or guarantor. In such cases a surety or guarantor shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but the same shall be allowed in so far only as it shall be shewn that the surety has been prejudiced thereby (*m*).

An effectual release of a debt, whether express or implied from conduct, discharges all securities for the same, whether original or collateral, in the hands of the creditor; but reconveyance is necessary to vest the legal estate in the mortgagor (*n*).

A mortgage of leasehold lands to secure \$5,000 made by three trustees and executors under a will recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the short forms act, and containing the usual covenant for payment by the mortgagors. In 1888, under a provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while \$3,000 still remained due, the security being

Surety
discharged if
principal
debtor
discharged.

Rule in
Manitoba.

Surety
may be
discharged
notwith-
standing
reservation
of rights.

(*k*) *Bolton v. Salmon* [1891] 2 Ch. 48.

(*l*) *Commercial Bank of Tasmania v. Jones* [1893] App. Cas. 313.

(*m*) 58 & 59 Vict. c. 6, s. 39, sub-s. 14.

(*n*) *Harrison v. Owen* (1738) 1 Atk. 520; *Cowper v. Green* (1841) 7 M. & W. 633; 18 R.C. 564.

greatly diminished in value and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement and seal with the then executors and trustees for an extension of the time for payment of the principal, which though providing for a reduction of the rate of interest also provided for being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved. It was held that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired, the relationship of principal and surety was created, and by virtue of the agreement notwithstanding the reservation of remedies the surety was discharged (o).

Where mortgagees sold the mortgaged premises without notice to a surety for part of the debt it was held that they were liable as between themselves and the surety for the full value of the property (p).

(o) *Canada Permanent Loan and Savings Co. v. Ball* (1899) 30 Ont. 557.

(p) *Martin v. Hall* (1878) 25 Gr. 471.

CHAPTER IX.

LIMITATION OF ACTIONS FOR RECOVERY OF MORTGAGE MONEYS.

SECTION I.

ACTION ON THE COVENANT.

The right of the mortgagee to recover principal and interest in an action on the covenant may be barred by lapse of time. Where there is no covenant to pay, the action of the mortgagee to recover the amount of the loan will be barred in six years and only six years' arrears of interest can be recovered (a).

Where no covenant for payment action barred in six years.

In Ontario under a covenant in a mortgage made before the first day of July, 1894, the action must be commenced within twenty years after the cause of action arose (b).

Mortgages made before 1st July, 1894, twenty years.

If the person entitled to bring the action is an infant or *non compos mentis* at the time when the cause of action accrues he may bring the action within twenty years after becoming of age or of sound mind, as the case may be (c).

In case the mortgagor is out of Ontario at the time Absence, the cause of action accrues the mortgagee may bring his action within twenty years after the return of the mortgagor to Ontario (d).

Where an acknowledgment is made by the person liable or his agent in writing, or by part payment or part satisfaction, the action may be brought within Acknowledgment by writing or part payment.

(a) *Wiley v. Ledyard* (1883) 10 P.R. 182; 21 Jac. I. c. 16; *Barnes v. Glenton* [1899] 1 Q.B. 885.

(b) Act respecting the Limitation of certain Actions, R.S.O. (1897) c. 72, s. 1, sub-s. 1 (b).

(c) R.S.O. (1897) c. 72, s. 3.

(d) R.S.O. (1897) c. 72, s. 5.

Mortgages
made after
1st July,
1894,
ten years.

twenty years after such acknowledgment by writing or part payment or part satisfaction. And if the person making the acknowledgment is at the time of making it out of Ontario the action may be brought within twenty years after he has returned (*e*).

Under a covenant for payment in a mortgage made on or after the first day of July, 1894, the period of limitation is ten years in each of the cases above mentioned (*f*).

The provisions of the act above referred to being sections 1, 3, 5 and 8 are as follows:—

1. (1) The actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned, that is to say:

- (a) Actions for rent, upon an indenture of demise.
- (b) Actions upon a bond, or other specialty, except upon the covenants contained in any indenture of mortgage made on or after the 1st day of July, 1894.
- (c) Actions upon a recognizance, within twenty years after the cause of such actions arose.
- (d) Actions upon an award where the submission is not by specialty.
- (e) Actions for an escape.
- (f) Actions for money levied on execution, within six years after the cause of such actions arose.
- (g) Actions for penalties, damages, or sums of money given to the party aggrieved, by any statute, within two years after the cause of such actions arose.
- (h) Actions upon any covenant contained in any indenture of mortgage, made on or after the 1st day of July, 1894, within ten years after the cause of such actions arose.

(2) But nothing herein contained shall extend to any action given by any statute, when the time for bringing the action is by the statute specially limited.

3. In case a person entitled to such action, as aforesaid, is at the time of the cause of action accruing within the age of twenty-one years, or *non compos mentis*, then such person may bring the action, within such time after coming to or being of full age, or of sound memory, as other persons having no such impediment should, according to the provisions of this Act, have done.

5. If a person against whom any such cause of action accrues, is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario.

8. In case an acknowledgment in writing, signed by the principal party or his agent, is made by a person liable upon an indenture, specialty or recognizance, or in case an acknowledgment is made by

(*e*) R.S.O. (1897) c. 72, s. 8

(*f*) R.S.O. (1897) c. 72, s. 1, sub-s. 1 (h).

such person by part payment, or part satisfaction, on account of any principal or interest due on such indenture, specialty or reorganization, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, within twenty years, or in the cases mentioned in clause (h) of sub-section 1 of section 1, within ten years, after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid; or in case the person entitled is at the time of the acknowledgment under disability, as aforesaid, or the party making the acknowledgment is, at the time of making the same out of Ontario, then within twenty years, or in the cases aforesaid within ten years, after the disability has ceased, as aforesaid, or the party has returned, as the case may be.

The corresponding enactment in England is 3 & 4 Will. IV. chapter 42.

Under the provisions above referred to, the mortgagee may recover in an action on the covenant the twenty years' arrears of interest if his mortgage was made before the first day of July, 1894; and ten years' arrears if his mortgage was made on or after that date.

It must be remembered, however, that the foregoing provisions are confined to the personal action on the covenant against the mortgagor or his personal representatives, and do not apply to actions brought to realize the security out of the land, the period of limitation for the latter class of actions being fixed since the first day of July, 1877, at ten years (g).

And so it has been held that although the mortgagee may not resort to the lands after ten years, his right of action on the covenant, where the mortgage was made before the first day of July, 1894, is nevertheless not barred until the lapse of twenty years (h).

Part payment to constitute an acknowledgment under the statute and keep the remedy alive must be made by a person liable on the indenture or his agent (i).

An acknowledgment of indebtedness made by a letter, written after the creditor's decease to the person who is entitled to administer the creditor's estate and who after

(g) Real Property Limitation Act, R.S.O. (1897) c. 133, s. 23.

(h) *Allan v. McTavish* (1878) 2 Ont. App. 278; *Macdonald v. McDonald* (1886) 11 Ont. 187; *McDonald v. Elliott* (1886) 12 Ont. 98, not following *Sutton v. Sutton* (1882) 22 Ch. D. 511.

(i) R.S.O. (1897) c. 72, s. 8.

Arrears of interest.

Provisions apply only to action on the covenant.

Part payment.

Acknowledgment.

the receipt of the letter takes out letters of administration, is a sufficient acknowledgment within the statute (*j*).

Payment by
mortgagor
keeps
remedy alive
against
surety.

Where a surety for the mortgagor has entered into a covenant for payment of the mortgage moneys a part payment made by the mortgagor will keep alive the remedy against the surety (*k*). And so payment by a surety will keep alive the remedy against the mortgagor (*l*).

But in *Paxton v. Smith* (*m*) after the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment by the surviving maker out of his own moneys and on his own account was held not to take the case out of the statute.

Receipt of
rents by
mortgagee
is not a
payment
by the
mortgagor
or his agent.

The receipt of rents by a mortgagee in possession is not a payment by the mortgagor or any one on his behalf so as to keep alive the right of action on the covenant (*n*). And so a payment of rent by a tenant of the mortgagor to the mortgagee in pursuance of a notice to pay the rent to the mortgagee is not a payment by the mortgagor or his agent so as to prevent the debt from being barred (*o*).

A judgment in an administration action or proceeding enures to the benefit of all creditors of the estate and prevents the statute running against them. But it does not prevent the statute running in favour of debtors to the estate (*oo*).

(*j*) *Robertson v. Burrill* (1895) 22 Ont. App. 356.

(*k*) *Dowling v. Ford* (1843) 11 M. & W. 329.

(*l*) *In re Seager, Seager v. Aston* (1857) 3 Jur. N.S. 481.

(*m*) (1889) 18 Ont. 178.

(*n*) *Cockburn v. Edwards* (1881) 18 Ch. D. 449, C. A.

(*o*) *Harlock v. Ashberry* (1882) 19 Ch. D. 539, C. A.

(*oo*) *Archer v. Severn* (1886) 12 Ont. 613; 14 Ont. App. 723.

SECTION II.

ACTION TO RECOVER THE MONEY OUT OF THE LAND.

The limitation of actions whereby it is sought to realize the mortgage moneys out of the land is governed by section 23 of the *Real Property Limitation Act* (*p*), which is as follows :—

23. No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent; and in such case no action or proceeding shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given.

As to what is a proceeding within the meaning of this section see *Neil v. Almond* (*q*).

It has been held in England that this section applies to an action to recover the mortgage money on the covenant for payment as well as to an action to realize the security out of the land (*r*). But where an action is brought to recover a simple contract debt which is charged on land the period of limitation is six years by the provisions of the *Limitation Act* of 1623, 21 Jac. I. chapter 16, and that period has not been enlarged (*s*).

But the Canadian courts have held that the action on the covenant does not come within section 23 of the *Real Property Limitation Act* (*t*), which provides that "no

(*p*) R.S.O. (1897) c. 133.

(*q*) (1897) 20 Ont. 63.

(*r*) *Sutton v. Sutton* (1882) 22 Ch. D. 511; *Fearnside v. Flint* (1883) 22 Ch. D. 579. In the Imperial Act the limit of time is twelve years.

(*s*) *Barnes v. Glenton* [1899] 1 Q.B. 885.

(*t*) *McDonald v. Elliott* (1886) 12 Ont. 98; *Macdonald v. McDonald* (1886) 11 Ont. 187; *Allan v. McTavish* (1878) 2 Ont. App. 278.

action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien &c." The words "out of any land or rent" it will be observed are not in the English act and were not in the Ontario act until the revision of the statutes in 1887.

Part payment may be made by mortgagor or his agent or purchaser of equity.

Payment by principal debtor will keep debt alive against surety.

"By the person by whom the same is payable or his agent."

Payment by a dowress.

Payment by purchaser of the equity of redemption.

In order to take a case out of the statute the payment must be made by the mortgagor or his agent duly authorized. But a payment by the assignee of the equity of redemption keeps the debt alive as against the mortgagor (*u*).

The payment must be made by a person liable to pay principal or interest; it need not be made by the party sought to be charged in the action or his agent. Thus a payment made by a principal debtor will keep the debt alive against a surety (*v*).

The words "by the person by whom the same is payable or his agent" apply to the making of the payment as well as to the signing of the acknowledgment (*w*).

Payment of interest by a tenant for life is a sufficient acknowledgement to keep the right of action alive against those entitled in remainder (*x*).

So a payment of interest made by a dowress is sufficient to keep the right of action alive as against others entitled to the estate (*y*).

Likewise a payment made by a purchaser of the equity

(*u*) *Forsyth v. Bristowe* (1853) 8 Exch. 716; *In re Hollingshead* (1888) 37 Ch. D. 651; *Dibb v. Walker* [1893] 2 Ch. 429; *Leahy v. De Moleyns* (1896) 1 I.R. 206; *Trust and Loan Co. v. Stevenson* (1892) 20 Ont. App. 66.

(*v*) *Chinnery v. Evans* (1864) 11 H.L.C. 115; *Harlock v. Ashberry* (1882) 19 Ch. D. 539; *Lewin v. Wilson* (1886) 11 App. Cas. 639; see also *In re Hall, Lilley v. Ford* [1899] 2 Ch. 107.

(*w*) *Chinnery v. Evans* (1864) 11 H.L.C. 115; *Harlock v. Ashberry* (1882) 19 Ch. D. 539; see also *Lewin v. Wilson* (1886) 11 App. Cas. 639.

(*x*) *Roddam v. Morley* (1857) 1 DeG. & J. 1; *Dibb v. Walker* [1893] 2 Ch. 429.

(*y*) *Ames v. Mannerling* (1859) 26 Beav. 583.

of redemption has been held to be a payment made by an agent of the mortgagor within the meaning of the section (z).

In a mortgage comprising several parcels of land which subsequently pass into different hands, a payment or acknowledgment made by the owner of one of the equities of redemption will keep the right of action alive as against the other owners who have not made any payment or acknowledgment (a).

So a payment made by a receiver will keep alive the Receiver's mortgagee's remedies (b).

In an action to realize a charge on land the mortgagee's right to be paid arrears of interest as the price of redemption is restricted to six years' arrears by section 17 of the *Real Property Limitation Act* (c) which is as follows:—

17. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

The corresponding English enactment is 3 & 4 Will. IV, chapter 27, section 42, which is practically identical with the Ontario act. This section does not relate to actions upon the covenant for payment but only to actions to enforce the charge against the land (d). Its effect is that the mortgagee has a lien on the land and is in the position of a secured creditor for six years' arrears, and that he is in the position of an unsecured creditor under the covenant for payment for the remainder of the twenty or ten years' arrears, as the case may be.

(z) *Forsyth v. Bristowe* (1853) 8 Exch. 716.

(a) *Chinnery v. Evans* (1864) 11 H.L.C. 115.

(b) *Chinnery v. Evans* (1864) 11 H.L.C. 115.

(c) R.S.O. (1897) c. 133.

(d) *Hunter v. Nuckolds* (1850) 1 Mac. & G. 640; *McMicking v. Gibbons* (1897) 24 Ont. App. 586.

Payment by
one of
several
owners of
several
equities of
redemption.

Arrears:
in action to
realize the
security six
years arrears
only allowed.

Section not
applicable
to actions
on the
covenant.

More than six years' arrears allowed against mortgagor redeeming.

But not as against subsequent incumbrancer.

Acknowledgment is only good against person giving it.

Where the action to enforce the charge is between the mortgagee and the mortgagor and no subsequent incumbrancer intervenes it is usual and proper (in order to make it unnecessary to bring a second action on the covenant) to allow the mortgagee to tack all the interest recoverable on the covenant even beyond six years' arrears (e).

But as against a subsequent incumbrancer seeking redemption, whether the action be for foreclosure or redemption, only six years' arrears will be allowed (f).

There is no distinction between a redemption action and a foreclosure action as to the price of redemption and therefore as to the arrears of interest to be allowed (g).

An acknowledgment is only available against the person giving it. Thus an acknowledgment given by the mortgagor will not enable the mortgagee to whom it was given to recover more than six years' arrears as against a second mortgagee (h).

In *Colquhoun v. Murray* (i) upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee endorsed upon the mortgage and signed a memorandum fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to

(e) *Carroll v. Robertson* (1868) 15 Gr. 173; *Taylor v. Hargrave* (1872) 19 Gr. 271; *Howeren v. Bradburn* (1875) 22 Gr. 96; *Allan v. McTavish* (1878) 2 Ont. App. 278; *Macdonald v. McDonald* (1886) 11 Ont. 187; *McMicking v. Gibbons* (1897) 24 Ont. App. 586; *Dingle v. Coppen* [1899] 1 Ch. 726.

(f) *McMicking v. Gibbons* (1897) 24 Ont. App. 586, overruling on this point *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11; but see *Dingle v. Coppen* [1899] 1 Ch. 726.

(g) *Du Vigier v. Lee* (1843) 2 Hare 326; *Sober v. Kemp* (1847) 6 Hare 155; *People's Loan and Deposit Co. v. Grant* (1890) 18 S.C.R. 262 at p. 278; *McMicking v. Gibbons* (1897) 24 Ont. App. 586; but see *Dingle v. Coppen* [1899] 1 Ch. 726.

(h) *Bolding v. Lane* (1863) 1 DeG. J. & S. 122.

(i) (1899) 26 Ont. App. 204; 35 C.L.J. 452.

pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser. It was held that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest.

An acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortgage created by their testator cannot be treated as the valid act of the two in their capacity of trustees, and is not a good acknowledgment within this section (*j*).

The section does not apply where the mortgagee sells the lands under the power of sale. In that case the mortgagee may retain out of the proceeds of sale all arrears of interest although they may exceed six years' arrears (*k*). But at any time before sale even if proceedings for sale have been taken the mortgagee will be required to accept six years' arrears from any one entitled to redeem other than the mortgagor or his personal representatives (*l*).

The acknowledgment required by section 17 does not differ materially from that required under section 23. It must be made to the person entitled or his agent.

An agent within the meaning of either section does not need to be authorized in writing (*m*), and his authority may be inferred from the surrounding circumstances (*n*).

A subsequent ratification of the agent's act is as effectual as if the agent had been specially authorized (*o*).

Acknowledgment by one of two executors not valid.

Mortgagee selling under power may retain all arrears of interest.

Agent need not be authorized in writing.

Subsequent ratification.

(*j*) *Astbury v. Astbury* [1898] 2 Ch. 111.

(*k*) *Ford v. Allen* (1869) 15 Gr. 565; *Edmunds v. Waugh* (1866) L.R. 1 Eq. 418.

(*l*) *McMicking v. Gibbons* (1897) 24 Ont. App. 586.

(*m*) *Coles v. Trecottick* (1804) 9 Ves. 234.

(*n*) *Thorne v. Heard* [1895] A.C. 495.

(*o*) *Jones v. Bright* (1829) 5 Bing. 533.

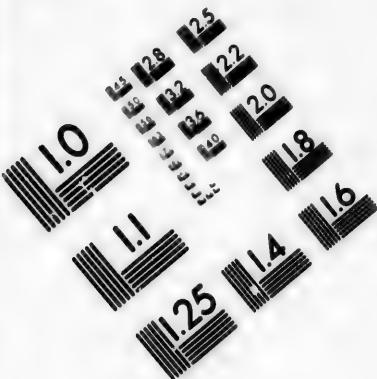
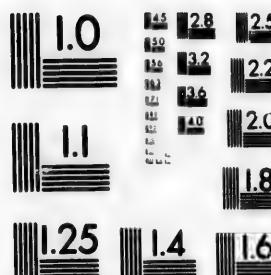
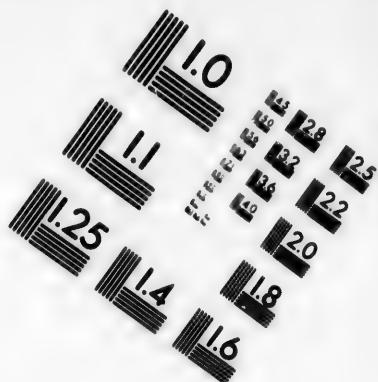
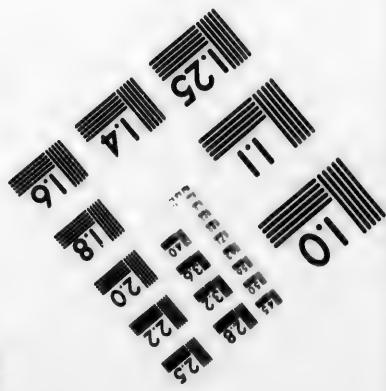


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It will be observed that section 17 does not provide for an acknowledgment by part payment.

Acknow-
ledgment
under section
17 may be
made at
any time.

Six years'
limitation
does not
apply against
subsequent
mortgagee
where prior
mortgagee
in posses-
sion.

The words "in the meantime" contained in section 23 do not occur in section 17. So it would seem that an acknowledgment given at any time even after the expiration of six years would be sufficient under section 17, provided the action is brought within six years after the acknowledgment (*p*).

The limitation of six years' arrears does not apply as against a subsequent mortgagee where a prior mortgagee has been in possession within one year next before action brought by the former. In such a case the subsequent mortgagee may recover the arrears of interest during the whole period of possession by the prior mortgagee. This is provided by section 18 which is as follows:—

18. Where any prior mortgagee or other incumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*q*).

(*p*) *Bolding v. Lane* (1863) 1 DeG. J. & S. 122.

(*q*) R.S.O. (1897) c. 133.

CHAPTER X.

INTEREST.

i. *Interest Generally.*

Interest on a mortgage though payable at fixed times is deemed to accrue from day to day (*a*). And as between persons entitled in succession to the interest it will be apportioned (*b*). Where interest is payable it is chargeable on the whole outstanding principal unless otherwise expressly provided. And where a mortgage contained a covenant to pay the principal sum in eight equal annual instalments, "with interest on the principal sum remaining due at each payment", it was held that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable, and not on the instalment only (*c*).

A mortgagee is entitled to charge interest upon all sums which by agreement express or implied he is authorized to add to his security, such as moneys paid upon prior incumbrances or for improvements, insurance premiums or taxes (*d*). These and other expenditures are usually provided for by express stipulation in the mortgage deed.

Interest begins to run only from the time the money is actually advanced and not necessarily from the date of the mortgage (*e*).

Interest
accrues from
day to day;
and will be
apportioned.

On what
interest may
be charged.

Interest runs
only from
time of
advance.

(*a*) *In re Rogers' Trusts* (1860) 1 Dr. & S. 338.

(*b*) *Edwards v. Countess of Warwick* (1723) 2 P. Wms. 171.

(*c*) *Hall v. Brown* (1858) 15 U.C.R. 419.

(*d*) *Quarrell v. Beckford* (1816) 1 Madd. 269; *McMaster v. Hector* (1872) 8 C.L.J. 284.

(*e*) *Edmonds v. Hamilton Provident and Loan Soc.* (1890) 19 Ont. 677; 18 Ont. App. 347.

When
payable in
advance.

Where two inconsistent dates are named for payment the date first mentioned if unequivocal must govern (ee).

Where the interest is payable in advance the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption. Thus in *Trust and Loan Co. v. Kirk* (f) interest on a mortgage was payable half-yearly in advance on the 1st of April and October. The mortgagee filed a bill for sale, and the registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiff interest to that date, but refused to allow him the half year's interest payable in advance on the 1st of April. Where an action is brought to foreclose a mortgage payable by instalments, and the defendant moves to dismiss on payment of the instalment and interest then due, the interest upon the mortgage money is to be computed only to the day named for payment in the mortgage, and not to the time of making the application (g).

Where purchase money out of which mortgage moneys are payable is directed to be paid into court on a certain day, but is not actually paid in till long after, the mortgagee is entitled to interest at the rate reserved in his mortgage until he receives notice of payment into court (h). Where the mortgagee by mislaying the mortgage deed or for some other reason is unable to give a discharge at the time when the mortgage moneys are paid or tendered he will not be allowed subsequent interest (i).

ii. Rate of Interest.

Any rate
of interest
may be
bargained
for.

The parties to a mortgage may stipulate for any rate of interest except in certain cases to be noticed presently.

(ee) *Bennett v. Foreman* (1868) 15 Gr. 117.

(f) (1880) 8 P.R. 203.

(g) *Strachan v. Murney* (1858) 6 Gr. 378.

(h) *McDermid v. McDermid* (1879) 7 P.R. 457.

(i) *Lord Middleton v. Eliot* (1847) 15 Sim. 531; *James v. Rumsey* (1879) 11 Ch. D. 308.

This is provided for by the *Act respecting Interest* (j). Section 1 of that act is as follows:—

1. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon (k).

Wherever interest is payable but no rate is fixed six per cent. may be recovered. Section 2 of the *Act respecting Interest* is as follows:—

2. Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per centum per annum.

Under mortgages made after the 1st day of July, 1886, where the mortgage moneys are made payable on the sinking fund plan or where principal and interest are blended, the mortgage shall contain a statement showing the amount of principal and the rate of interest chargeable thereon calculated yearly or half-yearly not in advance; otherwise no interest shall be recoverable. This is provided by section 3 of the *Act respecting Interest* which is as follows:—

3. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance (l).

Under section 4 no higher rate shall be recoverable than that shown in the statement. The section is as follows:—

4. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable, or recoverable on the principal money advanced, than the rate shown in such statement (m).

(j) R.S.C. (1886) c. 127; see *Teeter v. St. John* (1863) 10 Gr. 85.

(k) See also the *Loan Corporations Act*, R.S.O. (1897) c. 205, ss. 20, 21, 22, 23, 24 and 25, whereby provisions are made in Ontario respecting loan corporations similar to those contained in sections 1, 3, 4, 5, 6 and 7 of the *Act respecting Interest*, R.S.C. (1886) c. 127.

(l) See also R.S.O. (1897) c. 205, s. 21.

(m) See also R.S.O. (1897) c. 205, s. 22.

Six per cent.
allowed
where no
rate agreed
on.

Sinking fund
plan.

In Ontario the following provisions respecting interest have been made by sections 113 and 114 of the Judicature Act (*n*) :—

113. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.

114. (1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of the demand.

Rate of
interest per
annum need
not be
expressed in
mortgage
deed.

The *Interest Act*, 1897 (*o*), provides that in written contracts other than mortgages of real estate the yearly rate of interest shall be expressly stated, and not merely the rate per day, week or month. The sections of the act are as follows :—

2. Whenever any interest is, by the terms of any written or printed contract and whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate, or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent. per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.

3. If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract.

4. This Act shall not apply to mortgages on real estate.

iii. *Interest after Default.*

Stipulation
may be
made for
interest after
default.

There is nothing to prevent the parties to a mortgage contract from stipulating for the payment of interest at a specified rate on the mortgage moneys, whether principal or interest, which remain in arrear and unpaid after the days on which it was agreed they should be paid. The rate of interest in such a case must not exceed the rate of interest payable on the principal money when not in arrear (*q*). But when by the contract interest is stipulated

(*n*) R.S.O. (1897) c. 51.

(*o*) 60-61 Vict. (D.)c. 8.

(*q*) R.S.C. (1886) c. 127, s. 5; *Credit Foncier v. Schultz* (1893) 9 Man. R. 70.

for up to a certain day fixed for payment of the principal, the contract is not to be considered as providing by implication for the payment of subsequent interest at the same rate (*r*). Even where the same rate has been paid by the mortgagor for several years after maturity there is no implied contract to continue to pay at that rate (*s*). And where by the terms of the mortgage interest is payable on interest in arrear, but there is no express stipulation that interest on interest shall be paid after maturity of the principal, interest on interest after maturity is not recoverable (*t*).

If the contract provides that interest at a specified rate shall be payable on the principal "until paid," or "until payment in full," or "until fully paid off and satisfied," these and similar words do not constitute an agreement to pay interest after maturity. Such words relate only to the period fixed for the payment of principal (*u*). In *Popple v. Sylvester* (*v*) the words "so long as the sum of £3000 or any part thereof should remain due on the security of the said indenture" were held to be capable of the construction that interest was to be paid after, as well as before, default in payment of principal by the day fixed for payment (*w*).

If the agreement of the parties be that interest shall continue to be paid on the principal if not paid at maturity,

Form of proviso.

(*r*) *In re European Central Railway* (1876) 4 Ch. D. 33; *St. John v. Rykert* (1884) 10 S.C.R. 278; *Powell v. Peck* (1888) 15 Ont. App. 138; *The People's Loan and Deposit Company v. Grant* (1890) 18 S.C.R. 262; *Manitoba and North-West Loan Co. v. Barker* (1892) 8 Man. R. 296; *Cunningham v. Hamilton* (1897) 5 B.C.R. 539; *Hanford v. Howard* (1897) 1 N.B. Eq. 241.

(*s*) *Cook v. Fowler* (1874) L.R. 7 H.L. 27; *In re Roberts* (1880) 14 Ch. D. 49.

(*t*) *Wilson v. Campbell* (1879) 8 P.R. 154; *Manitoba and North-West Loan Co. v. Barker* (1892) 8 Man. R. 296.

(*u*) *St. John v. Rykert* (1884) 10 S.C.R. 278; *Archbold v. The Building and Loan Association* (1888) 15 Ont. 237; *Powell v. Peck* (1888) 15 Ont. App. 138; *People's Loan and Deposit Co. v. Grant* (1890) 18 S.C.R. 262; *Freehold Loan Co. v. McLean* (1891) 8 Man. R. 116.

(*v*) (1882) 22 Ch. D. 98.

(*w*) See also *King v. Greenhill* (1843) 6 M. & G. 59.

No implied agreement to pay interest after default at same rate; even if actually paid at that rate.

No implied contract to pay interest on interest after maturity.

Interest payable on principal "*until paid*" does not mean interest after default

it is usual to insert a clause after the proviso for payment clearly expressing the agreement. The following form of proviso may be used :—

“ Provided that interest at the rate aforesaid shall continue to be payable during the continuance of this security yearly (or half-yearly) on the _____ day of _____ in each year on the said principal sum in case the same or any part thereof shall remain unpaid after the time fixed by these presents for payment thereof.”

Land Titles Act.
Implied covenant to pay interest after default at same rate.

Interest may be allowed after default although no contract therefor.

Interest after default payable as damages.

Where a charge on land is created under the *Land Titles Act* there is an implied covenant that if the principal sum or any part thereof shall remain unpaid at the appointed time interest shall be paid half-yearly at the appointed rate on so much of the principal sum as for the time being shall remain unpaid (x).

Where the mortgage contract does not provide for the payment of interest after maturity of the mortgage moneys, interest may nevertheless be allowed by virtue of the *Ontario Judicature Act* (y). Interest in such cases will be allowed only on the overdue principal and not on the overdue interest (z). Interest will be allowed after maturity even where the mortgage provides that no interest shall be payable before maturity of the principal, or where the mortgage is expressed to be “without interest” (a).

The interest payable after default is payable as damages, and it has been held that the measure of damages is the ordinary value of money during the period of default (b). The rate of interest allowed in estimating the damages has varied and the decisions are conflicting. It has been held that the rate of interest to which the parties have agreed may be taken into consideration, and in some cases that rate has been allowed (c).

(x) R.S.O. (1897) c. 138, s. 34.

(y) R.S.O. (1897) c. 51, s. 114 sub-ss. 1 & 2.

(z) *Daniell v. Sinclair* (1881) L.R. 6 A.C. 181.

(a) *McDonell v. West* (1868) 14 Gr. 492; *Reid v. Wilson* (1881) 9 P.R. 166; 18 C.L.J. 58.

(b) *Archbold v. The Building and Loan Association* (1888) 15 Ont. 237.

(c) *Simonton v. Graham* (1881) 8 P.R. 495; *Cooke v. Fowler* (1874) L.R. 7 H.L. 27; *Powell v. Peck* (1888) 25 Ont. App. 138; *In re Roberts* (1880) 14 Ch. D. 49; *Mellersh v. Brown* (1890) 45 Ch. D. 225.

In *McDonald v. Elliott* (*d*), an action on the covenant, seven per centum was allowed, and in *Powell v. Peck* (*e*), a foreclosure action, interest was allowed at six per centum; although in each of these cases the security bore a higher rate upon its face.

In *Muttlebury v. Stevens* (*ee*), a foreclosure action, seven per centum, which was the rate stipulated for in the mortgage, was allowed during the period of six months fixed for redemption. But in this case the principal had not matured pursuant to the proviso for payment, but by virtue of an acceleration clause in the mortgage.

But in *Archbold v. Building and Loan Association* (*f*) where the mortgagees gave no evidence as to the measure of damages the interest was reduced from eight per centum, the mortgage rate, to six per centum the statutory rate (*g*).

In *The People's Loan and Deposit Company v. Grant* (*h*) the Supreme Court of Canada has held that in Ontario at least, the rate of interest recoverable as damages cannot exceed six per cent. Strong J. (now C.J.) in delivering judgment said:—

“I cannot assent to the suggestion of Mr. Justice Osler (not, however, acted on in the case under consideration) that in foreclosure and redemption actions more than 6 per cent. might be given by way of damages. Creditors have it in their power to stipulate for liquidated damages in case of default, and in my opinion if they do not do so they must, in the silence of their contract, be content with the statutory rate of 6 per cent. which, in the face of the express enactment of the statute, is not to be exceeded unless a larger rate of subsequent interest is actually contracted for.”

* * * * *

“In England there is no statutory provision as to the rate of interest, except as to judgment debts which by statute 1 & 2 Vict. c. 110, sec. 17, are to bear interest at 4 per cent. per annum. Here, however, we have the statute (now R.S.C. c. 127, sec. 2) fixing the

- (*d*) (1886) 12 Ont. 98.
- (*e*) (1886) 12 Ont. 492.
- (*ee*) (1886) 13 Ont. 29.
- (*f*) (1888) 15 Ont. 237.
- (*g*) R.S.C. (1886) c. 127, s. 2.
- (*h*) (1890) 18 S.C.R. 262.

Measure of
damages.

Six per cent.
is the
measure of
damages.

rate of interest in all cases where interest is recoverable, and where by the contract a rate is not expressly stipulated for, at 6 per cent. per annum. The words of this enactment are clear :

' Whenever interest is payable by agreement of the parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per cent. per annum.'

It follows that interest recoverable by way of damages in this country cannot exceed a yearly rate of six per cent.'

This decision has been followed in several subsequent cases (*i*).

Actions of
foreclosure
and
redemption
and on
covenant
on same
footing.

As regards the rate to be allowed for damages after default there is no distinction between actions for foreclosure and redemption and actions on the covenant. The same rate is to be allowed (*j*).

After judgment has been recovered for the mortgage debt, interest may be recovered on the judgment by virtue of section 116 of the *Ontario Judicature Act* (*k*), which is as follows :—

116. Unless it is otherwise ordered by the Court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceedings in the action, whether in the court in which the action is pending or in appeal.

In such a case the rate allowed will be the statutory rate of six per centum per annum (*l*). And no higher rate will be allowed even if a higher rate has been agreed to be paid after maturity, for the covenant for payment is merged in the judgment (*m*). Formerly in British Columbia by special statutory provision the rate agreed to be paid after maturity might be allowed on the judgment not however exceeding twelve per centum per annum (*n*).

(*i*) *Cunningham v. Hamilton* (1897) 5 B.C.R. 539; *Freehold Loan Co. v. McLean* (1891) 8 Man. R. 116; *Manitoba and Northwest Loan Co. v. Barker* (1892) 8 Man. R. 296.

(*j*) *Powell v. Peck* (1888) 15 Ont. App. 138; *Cook v. Fowler* (1874) L.R. 7 H.L. 27; *People's Loan Co. v. Grant* (1890) 18 S.C.R. 262.

(*k*) R.S.O. (1897) c. 51.

(*l*) R.S.C. (1886) c. 127, s. 2.

(*m*) *Ex parte Fencings* (1883) 25 Ch. D. 338; *St. John v. Rykert* (1879) 4 Ont. App. 213; 10 S.C.R. 278; *Arbuthnot v. Bunsilall* (1890) 62 L.J. 234; *Hanford v. Howard* (1897) 1 N.B. Eq. 241.

(*n*) R.S.C. (1886) c. 127, s. 26; repealed 53 Vict. (D.) (1890) c. 34, s. 2.

A judgment however on the covenant only merges that particular cause of action and does not affect any collateral remedy which the mortgagee may have (*o*). Thus where the mortgagee had recovered judgment on the covenant against the mortgagor for the principal and interest at the rate of seven per centum which it had been agreed should be paid during the continuance of the security, and had brought a subsequent action to realize the security, it was held that the mortgagee was entitled to recover interest at the same rate out of the proceeds of the mortgaged property after the date of the judgment on the covenant (*p*).

Where a mortgage provided for payment of the whole of the principal money in two years, with interest half-yearly at nine per centum per annum, and also provided that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable, and that on default of payment of any of the instalments secured at the times provided interest at the said rate should be paid on all sums so in arrear, it was held that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent per annum was chargeable upon it after the expiration of two years (*q*).

Rate reserved
may be
collected
after
judgment
on the
covenant.

"Principal
money"
is an
instalment.

iv. Increased Rate after Default.

A stipulation in a mortgage deed that the rate of interest shall be raised if interest at the normal rate is not punctually paid is regarded in equity as a penalty, and will be relieved against; but a proviso that the normal rate shall be reduced if interest be punctually paid at a lower rate is valid, and will be strictly enforced (*r*).

Increased
rate after
default not
allowed.

(*o*) *Wegg Prosser v. Evans* [1894] 2 Q.B. 101; [1895] 1 Q.B. 108.

(*p*) *Popple v. Sylvester* (1882) 22 Ch. D. 98.

(*q*) *Biggs v. Freehold Loan and Savings Co.* (1899) 26 Ont. App. 232.

(*r*) *Nicholls v. Maynard* (1747) 3 Atk. 519; 18 R.C. 141; R.S.C. (1886) c. 127, s. 5.

Increased rate of interest may not be charged on arrears of principal.

In mortgages made after the 1st day of July, 1880, it may be stipulated under section 5 of the *Act respecting Interest* (*s*) that interest shall be charged on arrears of principal, but not at an increased rate. The act provides as follows:—

6. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrear of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrear beyond the rate of interest payable on principal money not in arrear; but nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear (*t*).

6. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections next preceding, such sums may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal (*u*).

New bargain for increased rate.

But a new bargain may be made that an increased rate of interest shall be payable in consideration of forbearance or the like.

Parol agreement insufficient.

A bargain for extra interest made between a derivative mortgagee and the original mortgagor inures to the benefit of the original mortgagee (*v*). In one case a written promise by a mortgagor made after default to allow more than six per centum, the rate reserved by the mortgage, was held binding, although there did not appear by the writing to have been any consideration of forbearance or otherwise for the promise (*w*). But a parol agreement to add two per centum to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment was held to be insufficient to charge the extra interest upon the land as against a subsequent purchaser of the equity of redemption (*x*). A parol agreement to pay a higher rate of interest than that reserved in the

(*s*) R.S.C. (1886) c. 127.

(*t*) See also R.S.O. (1897) c. 205, ss. 20 and 23.

(*u*) See also R.S.O. (1897) c. 205, s. 24.

(*v*) *Grahame v. Anderson* (1868) 15 Gr. 189.

(*w*) *Brown v. Deacon* (1866) 12 Gr. 198.

(*x*) *Totten v. Watson* (1870) 17 Gr. 233.

mortgage is ineffectual to charge the lands as against a devisee or heir of the mortgagor (*y*).

In Ontario in mortgages made prior to the 1st day of July, 1880, a stipulation in the mortgage for an increased rate of interest after default has been held to be enforceable.

Mortgages
made before
July 1st,
1880.

Thus, where a mortgage stipulated that up to a certain day the interest should be eight per centum, and that if the principal were not then paid twelve per centum should be charged thereafter, it was held that the stipulation for payment of twelve per centum was not by way of penalty, but an agreement to pay that rate from the day named (*z*).

And where a mortgage to secure the repayment of money with interest at ten per centum provided that should default be made in payment of the principal money or interest, or any part thereof respectively, then the amount so overdue and unpaid should bear interest at the rate of twenty per cent. per annum until paid, it was held that the proviso was not invalid or relievable against on the ground of forfeiture (*a*).

But in England a stipulation whereby the rate of interest is increased in default of payment is regarded as in the nature of a penalty against which equity will grant relief (*b*).

A stipulation, however, providing that a lower rate than the rate reserved will be accepted if paid punctually is good, and the higher rate is recoverable after default (*c*).

Bargain
for a lower
rate if paid
punctually.

Where a loan is effected for the purpose of paying off incumbrances at once or as they become due at the option of the new mortgagee, and one of the incumbrances, bearing a lower rate of interest than the new mortgage, is not due, the new mortgagee cannot treat that mortgage as

(*y*) *Re Houston, Houston v. Houston* (1882) 2 Ont. 84; *Matson v. Swift* (1841) 5 Jur. 645.

(*z*) *Waddell v. McColl* (1868) 14 Gr. 211.

(*a*) *Downey v. Parnell* (1882) 2 Ont. 82; 18 C.L.J. 241.

(*b*) *Wallingford v. Mutual Society* (1880) 5 App. Cas. 685.

(*c*) *Davis v. Thomas* (1830) 1 R. & M. 506.

paid off and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the mortgage and notified the mortgagor to that effect. The new mortgagee is entitled to charge interest at the increased rate only on the amount actually paid to the prior mortgagee (*d*).

v. *Compound Interest.*

Compound
interest
not allowed
unless
stipulated
for.

In the absence of agreement, express or implied, compound interest cannot be recovered (*e*).

In mortgages made after the 1st day of July, 1880, there may be a stipulation that interest shall be charged on arrears of interest, but no interest may be charged and no fine or penalty may be exacted on arrears beyond the rate of interest payable on principal money not in arrear (*f*). Under section 6 of the *Act respecting Interest* all sums paid in excess of the amount lawfully chargeable may be recovered back or deducted from the balance due.

Assignee
of mortgage
not entitled
to interest
on interest
paid by him.

An assignee of a mortgage is not entitled to interest on interest in arrear paid by him on taking over the mortgage (*g*). And so in a suit to redeem a mortgage against an assignee who at the mortgagor's request paid off both principal and interest due at the time of the assignment, it was held that the assignee was not entitled to interest on the sum paid for interest (*h*).

Subsequent
mortgagee
paying off
prior
mortgagee.

But where a subsequent incumbrancer pays off a prior incumbrance he is entitled to interest on the aggregate amount paid by him for principal, interest and costs; interest on the principal being allowed at the rate reserved in his

(*d*) *Manley v. London Loan Co.* (1896) 23 Ont. App. 139; 26 S.C.R. 443.

(*e*) *Daniell v. Sinclair* (1881) 6 App. Cas. 181; *Thomson v. O'Toole* (1888) 21 N.S.R. 1; *Jackson v. Richardson* (1897) 1 N.B. Eq. 325; *McLaren v. Miller* (1874) 20 Gr. 637; and see 18 R.C. 181.

(*f*) *Act respecting Interest*, R.S.C. (1886) c. 127.

(*g*) *Cottrel v. Finney* (1874) 9 Ch. 541.

(*h*) *Thomas v. Givran* (1897) 1 N.B. Eq. 257.

own security, but on the interest and costs at six per centum only (*i*).

There is an implied obligation as between banker and customer to pay compound interest. Thus, where a mortgage is given to a banker to secure a floating balance of a banking account the banker may recover compound interest with yearly or even half-yearly rests (*j*). Banker entitled to compound interest from his customer.

(*i*) *McMaster v. Hector* (1872) 8 C.L.J. 284.

(*j*) *National Bank of Australasia v. United Hand-in-Hand Co.* (1879)
4 App. Cas. 391.

Covenant
to insure.

CHAPTER XI.

FIRE INSURANCE.

The form of mortgage provided by the *Act respecting Short Forms of Mortgages* (a) contains the following clause:—

12. And also that the said mortgagor or his heirs shall and will forthwith insure, unless already insured, and during the continuance of this security keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs, executors, administrators or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of _____ of lawful money of Canada, at the least, in some insurance office to be approved of by the said mortgagee, his heirs, executors, administrators or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of assurance, receipt or receipts thereto appertaining; and if the said mortgagee, his heirs, executors, administrators or assigns, shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payment shall be added to the debt hereby secured, and shall bear interest at the same rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.

The equivalent short form is as follows:—

12. And that the said mortgagor will insure the buildings on the said lands to the amount of not less than _____ currency (aa).

Statutory
power to
insure.

The *Act respecting Mortgages of Real Estate* (b) gives the mortgagee power to insure. Section 18 is as follows:—

18. Where any principal money is secured or charged by deed executed after the 11th day of March, 1879, on any hereditaments of any tenure, or on any interest therein, the person to whom the money shall, for the time being, be payable, his executors, administrators and assigns, shall, at any time after the expiration of four months from the time when the principal money shall have become payable, according to the terms of the deed, or after any interest on the principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the

(a) R.S.O. (1897) c. 126, Schedule B.

(aa) R.S.O. (1897) c. 126, Schedule B.

(b) R.S.O. (1897) c. 121.

property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:

1st. A power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner.

2nd. A power to insure, and keep insured, from loss or damage by fire, the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for such insurance to the principal money secured at the same rate of interest.

The provisions of section 18 do not apply where the mortgage deed contains a power to insure or a declaration that they shall not apply (c).

The mortgagor has by virtue of his equity of redemption an insurable interest in the mortgaged property, and his right to insure is co-extensive with the value of the property (d). But if he makes an absolute transfer of his equity of redemption he no longer has an insurable interest, and any insurance then existing in his favour ceases to be effectual unless it be assigned with the consent of the insurers to the transferee of the equity of redemption. The mortgagor's insurable interest does not cease until the mortgage debt has been paid, even although the mortgage has been foreclosed, for the mortgagor nevertheless continues to be liable for the mortgage debt (e).

Insurable interest of mortgagor.

The insurance is an indemnity against loss, and if the mortgaged property is destroyed by fire the mortgagor has a right to look to the insurance money in lieu of the property for the satisfaction of the mortgage debt. The mortgagee's insurable interest is co-extensive with his mortgage debt. In *Castellain v. Preston* (f) Bowen, L. J. said:—

Insurance is an indemnity against loss.

Insurable interest of mortgagee.

"The contract of insurance contained in a * * * fire policy is a contract of indemnity and indemnity only, and the insured, in case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified."

(c) s. 28.

(d) *Glover v. Black* (1763) 1 Wm. Bl. 396; 3 Burr. 1394.

(e) *Parsons v. Queen Insurance Co.* (1878) 29 U.C.C.P. 188 at p. 211; appealed to Privy Council but on another point 7 App. Cas. 96.

(f) (1883) 11 Q.B.D. 380.

It has been decided in New Brunswick that the interest of the mortgagee as such ends on foreclosure absolute, and that if a loss occur thereafter the mortgagee cannot recover on a policy issued to him as mortgagee (g).

Mortgagee insuring on his own account.

The insurance contract.

Mortgagor continues to be the insured notwithstanding loss payable to mortgagee.

If a mortgagee insure the mortgaged property out of his own funds without having any right under the mortgage deed or otherwise to recover the premium from the mortgagor, then the insurance is for the benefit of the mortgagee alone, and in the event of loss he is entitled to receive the amount of the policy without giving credit therefor upon the mortgage (h).

The insurance is generally effected in the name of the mortgagor, and a clause is inserted in the policy providing that the loss, if any, shall be payable to the mortgagee as his interest may appear.

Where by the terms of the policy the mortgagor is the insured, the contract being between him and the insurer, and the policy contains a clause by which the moneys are made payable to the mortgagee in the event of loss, this does not create an insurance of the mortgagee's interest so as to enable him to recover upon the policy as an insurance contract with him, but it is a mere appointment of the mortgagee to receive the moneys, and a direction and authority to the insurers to pay him instead of the mortgagor (i).

Notwithstanding the insertion of this clause the mortgagor continues to be the insured, and a subsequent breach by the mortgagor of the conditions of the policy, as for instance by assigning the property without the consent

(g) *Gaskin v. Phoenix Insurance Co.* (1866) 6 All. (New Bruns.) 429.

(h) *Russell v. Robertson* (1859) 1 Chy. Ch. 72; *Dobson v. Land* (1850) 8 Hare 216; *King v. State Mutual Fire Ins. Co.* (1851) 6 Mass. 1.

(i) *Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn* (1858) 17 N.Y. 391; *Continental Ins. Co. v. Hulman & Cox* (1879) 92 Ill. 145; *Franklin Savings Institution v. Central Mutual Fire Ins. Co.* (1876) 119 Mass. 240; *Brunswick Savings Institution v. Commercial Union Ins. Co.* (1878) 68 Me. 313; *Martin v. Franklin Fire Ins. Co.* (1875) 38 N.J.L.R. 140; *Tallman v. Atlantic Fire & Marine Ins. Co.* (1865) 29 How. 71; *Livings-
stone v. Western Ins. Co.* (1869) 16 Gr. 9; *Mitchell v. City of London Ass. Co.* (1888) 15 Ont. App. 262.

of the insurer, will make it void as against both mortgagor and mortgagee (*j*).

In *Caldwell v. Stadacona Fire and Life Ins. Co.* (*k*), the action was by a mortgagor upon a policy of insurance under seal which contained a provision that the loss should be payable to the mortgagee, and it was held by the Supreme Court that the action was properly brought by the mortgagor. The court, however, was not dealing with the equitable rights of the mortgagee under a covenant to insure, a subject which will be adverted to presently, but only with the objection of the insurers that the action should have been brought by the mortgagee.

Who may sue in such case.

In *Mitchell v. City of London Fire Ins. Co.* (*l*), the policy was not under seal but merely executed by the company's agent under power of attorney, the loss, if any, being payable to the mortgagee as his interest might appear. The policy provided that the company's assent should be necessary to an assignment of the policy. An assignment was made to the mortgagee but the company did not consent thereto. It was held, nevertheless, that the mortgagee could bring action in his own name upon the ground that the relation of trustee and *cestui que trust* had been created between the mortgagor who effected the insurance and the mortgagee.

In a Nova Scotia case a policy not under seal contained the following provision:—"Loss, if any, payable to the order of Peter Brush, if claimed within sixty days after proof, his interest therein being as mortgagee;" and it appearing that the policy was obtained by the mortgagor in pursuance of a covenant entered into by him with Brush, that he should insure in the name and for the benefit of

(*j*) *Livingstone v. Western Ass. Co.* (1868) 14 Gr. 461; in appeal 16 Gr. 9; *Chishom v. The Provincial Ins. Co.* (1869) 20 U.C.C.P. 11; *Mitchell v. City of London Ass. Co.* (1888) 15 Ont. App. 262.

(*k*) (1883) 11 S.C.R. 212; see *McQueen v. Phoenix Mutual Fire Ins. Co.* (1880) 4 S.C.R. 660.

(*l*) (1888) 12 Ont. 706; 15 Ont. App. 262.

Brush, it was held that the mortgagee was entitled to sue on the policy in his own name (*m*).

Effect of covenant to insure.

But where the mortgagor has insured the premises in pursuance of a covenant to that effect in the mortgage, the mortgagee is entitled to the benefit of the insurance and may recover it in his own name to the extent of his interest, even although he is not mentioned in the policy, on the ground that the covenant gives him an equitable interest in, and a lien upon, the proceeds of the policy (*n*).

Insurance cannot be cancelled without notice to insured.

Where an owner of property effects an insurance thereon and subsequently mortgages the property, assigning the policy to the mortgagee, the insurance company cannot by arrangement with the mortgagee without the knowledge or consent of the mortgagor cancel the insurance. The mortgagor notwithstanding the assignment continues to be the person insured within the meaning of the *Insurance Act* (*o*), and the policy cannot be cancelled unless notice in writing be served upon the insured as required by the act (*p*).

Mortgagor not estopped by settlement under mortgagee's policy.

Where the mortgagor and the mortgagee effect separate insurances on their respective interests with different companies, and the mortgagee upon a loss occurring settles the amount of the loss with the company insuring him, this, even although the mortgagor may assent to such settlement, is not an estoppel against the mortgagor in favor of the other insurance company and the mortgagor may nevertheless claim payment under his policy (*q*).

Consent not required to assignment of policy not accompanied by transfer of property.

The fourth statutory condition (*r*) provides that if the property insured is assigned without the written permission of the company the policy shall thereby become void.

(*m*) *Brush v. Aetna Ins. Co.* (1864) 1 Old. (N.S.) 459.

(*n*) *Greet v. Citizen's Ins. Co.* (1879) 27 Gr. 121; 5 Ont. App. 596.

(*o*) R.S.O. (1897) c. 203, s. 168, sub-s. 19.

(*p*) *Morrow v. Lancashire Ins. Co.* (1898) 29 Ont. 377.

(*q*) *Prittie v. Connecticut Fire Ins. Co.* (1896) 23 Ont. App. 449.

(*r*) *Insurance Act R.S.O.* (1897) c. 203, s. 168.

This, however, applies only to an assignment of the property and not to an assignment of the policy unaccompanied by a transfer of ownership of the property (s).

The owner of a parcel of land mortgaged it to a loan company and subsequently gave a second mortgage thereon to the same company, the second mortgage comprising other land on which were buildings and containing a covenant to insure. Subsequently the equity of redemption was sold, the purchaser covenanting to pay off the mortgages. The purchaser then insured the buildings comprised in the second mortgage in his own name, the policy providing that the loss, if any, should be payable to the mortgagees as their interest might appear. The buildings included in the second mortgage were destroyed by fire, and the insurance moneys were more than sufficient to pay the balance due on the second mortgage which was in default. The mortgagees claimed the right to apply the surplus in payment of the first mortgage which was also in default. It was held that the mortgagees were not entitled to consolidate their mortgages so as to apply the surplus of insurance moneys in payment of the first mortgage, but that they were restricted to the right to recover the amount remaining unpaid on the second mortgage. For the owner of the equity of redemption had a legal right to recover from the insurance company the balance of insurance moneys after satisfaction of the second mortgage; and the doctrine of consolidation applies only when the mortgagor or owner of the equity of redemption, having no legal rights, asks the court to give effect to his equity in an action of foreclosure or redemption (t).

It has been already explained that an insurance policy issued to a mortgagor and assigned to the mortgagee is

(s) *McPhillips v. London Mutual Fire Ins. Co.* (1896) 23 Ont. App. 524.

(t) *Re the Union Assurance Co.* (1893) 23 Ont. 627. See *Howes v. The Dominion Fire and Marine Ins. Co.* (1883) 8 Ont. App. 644; *Chesworth v. Hunt* (1880) 5 C.P.D. 266; *Cummins v. Fletcher* (1880) 14 Ch. D. 699; *Jennings v. Jordan* (1881) 6 App. Cas. 698.

Mortgagee to whom loss payable under one mortgage not entitled to consolidation.

liable to be invalidated by the act or negligence of the former. For this reason what is known as the mortgage clause has come into use within recent years. This clause is a special agreement between the insurer and the mortgagee that the insurance to the extent of the mortgagee's interest shall not be invalidated by any act or neglect on the part of the mortgagor.

In *National Fire Insurance Co. v. McLaren* (*a*) Boyd, C. said :—

"The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company."

Mortgage clause.

The form of mortgage clause adopted by The Canadian Fire Underwriters' Association is as follows :—

"Mortgage Clause," Policy No. . . . It is hereby provided and agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard, not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance.

It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage, and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim.

(*a*) (1886) 12 Ont. 682.

It is also further provided and agreed that in the event of the said property being further insured with this or any other office, on behalf of the owner or mortgagee, the company, except such other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a rateable proportion of any loss or damage sustained.

At the request of the assured, the loss, if any, under this policy is hereby made payable to _____ as _____ interest may appear, subject to the conditions of the above mortgage clause.

The effect of the mortgage clause was fully considered in *Bull v. North British Canadian Investment Co.* (v). Effect of mortgage clause.

In that case the mortgagees applied for a policy of insurance to be issued in the name of the mortgagor. The policy was so issued in the name of the mortgagor, loss, if any, payable to the mortgagees, and subject to a mortgage clause which was inserted in the policy without the knowledge or consent of the mortgagor. The premiums were paid by the mortgagor. A fire occurred and the insurance company paid the mortgagees the amount of the policy. The mortgagor claimed to have the mortgage discharged as being satisfied by the insurance money; the insurance company claimed that the mortgagor for certain reasons alleged by them had forfeited any claim under the policy, that they notwithstanding that no liability existed on their part to the mortgagor had paid the insurance money to the mortgagees upon the condition that they should be subrogated to the rights of the mortgagees as provided by the mortgage clause, and that they were entitled to an assignment of the mortgage. It was held by the Supreme Court, affirming the result of the judgments in the courts below, that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were

(v) (1886) 14 Ont. 322; 15 Ont. App. 421; 18 S.C.R. 697.

assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage. It was held, also, that the insurance company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him.

The mortgage clause does not effect a new insurance in favour of the mortgagee. The insurer thereby agrees with the mortgagee that to the extent of his interest the insurance will not be invalidated by future act or negligence of the mortgagor, but the insurer is not debarred from setting up that the insurance was procured by fraud and therefore void *ab initio* (*w*).

**Recovery of
value of
remedies
renounced.**

An insurer entitled to subrogation may recover from the insured not only the amount of any compensation or the value of any benefit received by the assured in excess of his actual loss, but also the full value of any rights or remedies against third persons which have been renounced by the assured and to which, but for such renunciation, the insurer would have been entitled to be subrogated (*x*).

**Subrogation
where
insurance
wholly for
benefit of
mortgagee.**

If a mortgagee effects an insurance on his own account without having any right either by express contract or by statute to recover the premium from the mortgagor, the mortgagor has no claim on the proceeds of the policy, but the insurance company, it would seem, is entitled to the benefit of the mortgagee's security upon paying the loss; and conversely if the mortgagee is paid by the mortgagor after loss, the mortgagee cannot recover on the policy. And if after payment of the policy the mortgagee recovers, whether by suit or otherwise, the mortgage debt, he must refund to the insurance company so much of his total receipts from both mortgagor and insurance company as is

(*w*) *Omnium Securities Co. v. Canada Fire and Mutual Ins. Co.* (1882) 1 Ont. 494.

(*x*) *West of England Fire Ins. Co. v. Isaacs* [1896] 2 Q.B. 377; [1897] 1 Q.B. 226.

in excess of his actual loss by the fire (*y*). But there can be no such thing as subrogation to the right of a mortgagee whose claim is not wholly satisfied (*z*).

By the *Act respecting Mortgages of Real Estate* (*a*) it is enacted that—

Application
of insurance
moneys.

(1) All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage.

This section was originally section 9 of the *Conveyancing and Law of Property Act, 1886* (*b*), and was based on the provisions of the *Imperial Conveyancing and Law of Property Act, 1881*, 44 and 45 Vict., chapter 41 (*c*).

Origin of
section.

Before this enactment there was no implied agreement between the mortgagor and the mortgagee that insurance moneys when received by the mortgagee should be applied in liquidation of the mortgage debt. The mortgagor might have stipulated that the moneys should be applied towards payment of the debt or in restoration of the premises; but in the absence of such stipulation the mortgagee could at his option apply the moneys on the mortgage debt or hold them as collateral security until his debt should be fully paid off (*d*).

Effect of
section.

(*y*) *Porter on Insurance* 2nd ed. p. 283, citing *Castellain v. Preston* (1883) 11 Q.B.D. 380; *Smith v. Columbia Ins. Co.* (1851) 17 Penn. 253; *King v. State Mutual Fire Ins. Co.* (1851) 61 Mass. 1.

(*z*) *National Fire Ins. Co. v. McLaren* (1886) 12 Ont. 682.

(*a*) R.S.O. (1897) c. 121.

(*b*) 49 Vict. (Ont.) (1886) c. 20.

(*c*) By the *Metropolitan Building Act* 14 Geo. III. (Imp.) (1774) c. 78, s. 83, insurance offices were required, upon the request of any person interested in or entitled to any house or other building burnt down or damaged by fire, to apply the insurance money towards reinstating or repairing such house or building. This act was held to be in force in Ontario: *Stinson v. Pennock* (1868) 14 Gr. 604; *Carr v. Fire Assurance Association* (1887) 14 Ont. 487. But the *Ontario Insurance Act, 1887*, 50 Vict. c. 26, s. 154, provided that the *Metropolitan Building Act* is not “to be deemed to be in force with regard to property in this Province.”

(*d*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347.

These provisions were intended for the benefit of the mortgagee and do not diminish the rights which he had prior to their enactment.

**Rights of
mortgagee in
respect of
insurance
moneys
received by
mortgagor.**

**Mortgagee
may hold
insurance
moneys
received by
himself as
collateral
security.**

The effect of the act was to confer the following additional powers upon the mortgagee:—

(1.) He may require insurance moneys received by the mortgagor to be applied in restoring the mortgaged premises so far as the money will extend;

(2.) He may require insurance moneys received by the mortgagor to be applied in liquidation of the mortgage debt.

Where the mortgagee receives the insurance money he still has the right to hold the money as he held the policy, as collateral or additional security for the mortgage debt, and he is not bound to apply it towards payment of either principal or interest overdue (*dd*).

In *Edmonds v. Hamilton Provident and Loan Society* (*e*) Osler, J.A., said:—

"Now the act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must I think be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both,

(*dd*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347, reversing the judgment of the Queen's Bench Division on this point, 19 Ont. 677, and disapproving of *Corham v. Kingston* (1889) 17 Ont. 432, in so far as it was thereby decided that the mortgagee was bound to apply the insurance money on principal and interest as they matured; *Austin v. Story* (1863) 10 Gr. 306; *Green v. Hewer* (1871) 21 U.C.C.P. 531; *Cockburn v. Edwards* (1881) 18 Ch. D. 449.

(*e*) (1891) 18 Ont. App. 347 at p. 357.

overdue, or to make no application of it if he should deem it more advisable for the security of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants."

MacLennan, J.A. said (*f*):—

"He may keep the insurance money by him and sue for arrears, or restrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out."

If the mortgagee receives the insurance money before the time appointed for payment of the money secured by the mortgage he is entitled, nevertheless, to the interest without abatement (*g*).

Mortgagee
entitled to
interest not-
withstanding
receipt of
insurance
moneys.

(*f*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347 at p. 367.

(*g*) *Edmonds v. Hamilton Provident and Loan Society* (1891) 18 Ont. App. 347 at p. 356; *Austin v. Story* (1863) 10 Gr. 306.

CHAPTER XII.

RECEIVER.

Receiver appointed by the parties.

Receiver appointed by the court.

Pending action ; jurisdiction.

Equitable mortgagee.

A receiver may be appointed by the parties either at the time of the making of the mortgage or afterwards. If the appointment is made by the mortgagor, the receiver will be regarded as his agent and payments made by him to the mortgagee will be considered payments made by a mortgagor in possession. In such a case the mortgagee will have most of the advantages without any of the responsibilities of a mortgagee in possession (*a*). A mortgagee may of his own authority appoint a receiver, but in such a case the receiver will be the agent of the mortgagee who will then be deemed to have taken possession and will be liable to account as a mortgagee in possession (*b*).

The nature of the office of a receiver appointed under a power in a mortgage deed or under a statutory power, and the extent of his powers, are very different from those of a receiver appointed by the court. The former derives his authority wholly from the deed appointing him, and he cannot go beyond the powers given to him by that deed or by law. The latter is an officer of the court, and is accordingly protected by the court in the exercise of the powers conferred upon him (*c*).

The court has no jurisdiction to appoint a receiver unless an action is pending; an originating summons, however, is deemed an action for this purpose (*d*).

An equitable mortgagee is after default entitled to a receiver where the mortgagor is in possession, whether the

(*a*) *Law v. Glenn* (1867) 2 Ch. 634.

(*b*) *Quarrell v. Beckford* (1816) 1 Madd. 269.

(*c*) *Burt, Boulton & Hayward v. Bull* [1895] 1 Q.B. 276; 18 R.C. 462.

(*d*) *In re Fawsitt, Galland v. Burton* (1885) 30 Ch. D. 231.

security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the action (e).

The court will not, as a general rule, appoint a receiver on the application of a subsequent mortgagee if the first mortgagee is in possession (f). But if the first mortgagee is not in possession a receiver may be appointed on the application of a subsequent mortgagee, subject to the rights of the prior mortgagee (g). Where a prior mortgagee in possession has acquired the equity of redemption and it is shown that he has received more than sufficient to pay off his mortgage, a receiver may be appointed (h).

First mort-gagee in possession.

Formerly the court would not appoint a receiver on the application of a mortgagee having the legal estate, but left him to his legal remedy to obtain possession (i).

Mortgagee having the legal estate.

But now under sub-section 9 of section 58 of the *Ontario Judicature Act* (j), a receiver may be appointed in all cases in which it shall appear to the court to be just or convenient that such order should be made.

A mortgagee who has the legal estate even if he has taken possession may apply to have a receiver appointed, but it must be shown that it will be just or convenient to make the appointment (k).

But a mortgagee who has taken possession cannot have a receiver appointed merely to relieve himself of the responsibility of a mortgagee in possession (l).

Mortgagee in possession

A receiver will usually be appointed on an interlocutory application if the interest is in arrear or if the property

Interlocu-tory application.

(e) *Aikins v. Blain* (1867) 13 Gr. 646.

(f) *Berney v. Sewell* (1820) 1 J. & W. 647.

(g) *Berney v. Sewell* (1820) 1 J. & W. 647.

(h) *Steinhoff v. Brown* (1865) 11 Gr. 114.

(i) *Berney v. Sewell* (1820) 1 J. & W. 647; *Kelsey v. Kelsey* (1874) L.R. 17 Eq. 495.

(j) R.S.O. (1897) c. 51.

(k) *Tilletti v. Nixon* (1883) 25 Ch. D. 238; *County of Gloucester Bank v. Rudy &c. Colliery Co.* [1895] 1 Ch. 629.

(l) *Re Prytherch, Prytherch v. Williams* (1889) 42 Ch. D. 590.

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would be in danger if left in the possession of the mortgagor (*m*), or if the title to the land is in dispute (*n*).

Mortgagor refusing to give up possession.

Where the mortgagor prevents the mortgagee from taking possession of the property a receiver may be appointed on an interlocutory application (*o*).

Right to nominate receiver.

The right to propose a person as receiver belongs generally to the mortgagee applying to have the appointment made. A party to the action will not usually be appointed receiver; if appointed he will not be allowed a salary (*p*). The solicitor for the mortgagee will not be appointed receiver even with the mortgagor's consent, as it is his duty to be a check on the receiver (*q*).

(*m*) *Evans v. Coventry* (1854) 5 DeG. M. & G. 911.

(*n*) *Berry v. Keen* (1882) 51 L.J. Ch. 912.

(*o*) *Truman & Co. v. Redgrave* (1881) 18 Ch. D. 547.

(*p*) *Sargent v. Read* (1876) 1 Ch. D. 600.

(*q*) *In re Lloyd, Allen v. Lloyd* (1879) 12 Ch. D. 447.

CHAPTER XIII.

FIXTURES.

Fixtures are chattels which were originally movable but which having been attached to the land have ceased to be movable and have become part of the freehold. Anything imbedded in the soil or attached to any permanent building or erection by cement, bolts, nails or other fastenings, so as not to be movable without the exercise of force is, in general, a fixture (*a*). So whatever is substantially part of a house, mill or other building so that it cannot be removed without depriving the building of what was intended to be used with it, will be deemed a fixture (*b*).

Definition of fixture.

The "fixtures" included in the meaning of the expression "personal chattels" by section 10 of the Nova Scotia *Act for the Prevention of Frauds on Creditors by Secret Bills of Sale* (*bb*) are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act. An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia statute, and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee (*c*).

Nova Scotia
Bills of Sale
Act.

There are two classes of fixtures; first, those that are actually annexed, as to which even the slightest annexation

Fixtures are
actual or
constructive.

(*a*) *Ex parte Moore & Robinson's Banking Co., in re Armytage* (1880) 14 Ch. D. 379.

(*b*) *Smith v. MacLure* (1884) 32 W.R. 459.

(*bb*) R.S.N.S. (1884) c. 92.

(*c*) *Warner v. Don* (1896) 26 S.C.R. 388.

is sufficient to carry them with the mortgage ; and secondly, those which are not actually affixed to the soil but which may be deemed to be constructively annexed ; as to these the onus is upon the mortgagee to shew that they are fixtures (*d*).

Fixtures by agreement.

Right to fixtures may be excluded by agreement

Intention of person affixing.

Considerations in deciding whether chattels are fixtures or not.

Chattels of the nature of plant or machinery not structurally affixed to the freehold, as well as those of a like nature afterwards placed on the mortgaged premises, may by the express terms of a mortgage of the realty become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance (*e*). Likewise the mortgagee's right to fixtures may be excluded by express stipulation (*f*).

In determining whether or not a chattel has become a fixture the intention of the person affixing it to the soil is material, but only so far as it can be presumed from the degree and object of the annexation (*g*).

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures, with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold ; and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding

(*d*) *Holland v. Hodgson* (1872) L.R. 7 C.P. 328.

(*e*) *The Canada Permanent Loan and Savings Company v. The Traders' Bank* (1898) 29 Ont. 479.

(*f*) *Waterfall v. Penistone* (1856) 6 E. & B. 876.

(*g*) *Hobson v. Gorringe* [1897] 1 Ch. 182 ; see also *Holland v. Hodgson* (1872) L.R. 7 C.P. 328 ; *Wood v. Hewett* (1846) 8 Q.B. 913 ; *Lancaster v. Eve* (1859) 5 C.B. (N.S.) 717.

that both as to the degree and object of the annexation they became part of the realty (*h*).

A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land after the mortgage was made by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently (*i*).

An engine used in connection with a mining property, fastened to a foundation formed of tiers of timber laid in a pit, was held as against an execution creditor to be a fixture and to pass with the land under a mortgage of the mine (*j*).

A chattel mortgage on *de facto* fixtures although duly filed will not prevail as against a subsequent mortgagee of the land who registers his mortgage without actual notice of the prior chattel mortgage (*k*).

Fixtures annexed to the freehold will pass to the mortgagee on the execution of a mortgage of leaseholds or freeholds although not expressly mentioned therein; and even chattels only slightly affixed have been held to pass (*l*); and the mortgagee may restrain their removal, or recover their value if removed without his consent (*m*). If removed no title passes even to an innocent purchaser, and the

(*h*) *Haggart v. Town of Brampton* (1897) 28 S.C.R. 174.

(*i*) *Miles v. Ankatell* (1898) 25 Ont. App. 458; see also *Turner v. Melbane* (1892) 28 C.L.J. 324.

(*j*) *Don v. Warner* (1896) 28 N.S.R. 202, *sub nom. Warner v. Don*, 26 S.C.R. 388.

(*k*) *Bacon v. Rice Lewis & Son* (1897) 33 C.L.J. 680.

(*l*) *Hare v. Horton* (1833) 5 B. & Ad. 715; *Holland v. Hodgson* (1872) L.R. 7 C.P. 328; *Warner v. Don* (1896) 26 S.C.R. 388; *Keeper v. Merrill* (1881) 6 Ont. App. 121; *McCausland v. McCallum* (1882) 3 Ont. 305.

(*m*) *Ackroyd v. Mitchell* (1860) 3 L.T.N.S. 236; *Canada Permanent Loan and Savings Co. v. Traders Bank* (1898) 29 Ont. 479.

mortgagee is entitled to an order for their replacement (*n*). And the mortgagee will have the same right over fixtures attached to the land whether affixed before or after the making of the mortgage (*o*).

Where a mortgage was created on land on which was a steam saw mill, the mortgagor was restrained from removing the machinery although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises (*p*).

A mortgagee filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that though the building had been actually removed it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal and that there might be difficulty in restoring it an enquiry was directed to ascertain the value thereof as sufficient for the justice of the case (*q*).

Mortgagee
entitled to
fixtures as
against an
execution
creditor.

Trade
fixtures of
a tenant.

A mortgagee of land is entitled to fixtures as against an execution creditor of the mortgagor. The fact that fixtures have sometimes been mortgaged as chattels does not render them exigible to an execution as against a mortgagee of the freehold (*r*). But where a mortgagor leased the property to a tenant who brought in trade fixtures, and the mortgagee afterwards entered into possession, it was held that the mortgagee was not entitled to the fixtures as against the tenant (*s*).

(*n*) *Scottish American Investment Co. v. Sexton* (1894) 26 Ont. 77; *Dickson v. Hunter* (1881) 29 Gr. 73.

(*o*) *Climie v. Wood* (1868) L.R. 3 Ex. 257; L.R. 4 Ex. 328; *Meux v. Jacobs* (1875) L.R. 7 H.L. 481; *Hobson v. Gorringe* [1897] 1 Ch. 182; *Dickson v. Hunter* (1881) 29 Gr. 73.

(*p*) *Gordon v. Johnston* (1868) 14 Gr. 402.

(*q*) *Meyers v. Smith* (1869) 15 Gr. 616.

(*r*) *Carson v. Simpson* (1894) 25 Ont. 385; see *Rogers v. Ontario Bank* (1891) 21 Ont. 416.

(*s*) *Sanders v. Davis* (1885) 15 Q.B.D. 218; see also *Walmsley v. Milne* (1859) 7 C.B.N.S. 115.

A mortgage of lands does not require registration as a chattel mortgage as to fixtures on the land, even although the fixtures are referred to as chattels in the mortgage (*t*).

A gas engine was let out on the hire and purchase system under an agreement in writing which provided that it should not become the property of the hirer until payment of all the instalments and should be removable by the owner on default in payment of any instalment. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking and was used by him for the purposes of his trade. Default having been made in payment the engine was claimed by the owner and also by a mortgagee of the land who took his mortgage after the hiring agreement and without notice of it, and entered into possession while the engine was still on the land. It was held that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture, and that consequently it passed to the mortgagee as part of the freehold. It was further held that even if a license to remove the engine could be implied from the mortgagee's leaving the mortgagor in possession, the entry of the mortgagee into possession determined such license (*u*).

But it would appear that the owners of machinery who let it out under a hire and purchase agreement are entitled to remove it before the mortgagee takes possession (*v*).

Hire and purchase system.

Owners may remove fixtures before the mortgagee takes possession.

(*t*) *Kitching v. Hicks* (1884) 6 Ont. 739; *Robinson v. Cook* (1884) 6 Ont. 590.

(*u*) *Hobson v. Gorringe* [1897] 1 Ch. 182; see also *Gough v. Wood* [1894] 1 Q.B. 713; *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.* [1892] 1 Ch. 415; *Thomas v. Inglis* (1885) 7 Ont. 588; *Stevens v. Barfoot* (1886) 13 Ont. App. 366.

(*v*) *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.* [1892] 1 Ch. 415.

In Ontario the law with regard to certain fixtures is governed by statute. Section 1 of the *Act respecting Conditional Sales of Chattels* (*w*) provides as follows:—

Conditional sales of chattels.

1. Receipt notes, hire receipts and orders for chattels, given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels which at the time possession is given to the bailee have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing signed by the bailee or his agent.

Section 2 provides as follows:—

2. The preceding section shall not apply to household furniture, other than pianos, organs or other musical instruments; nor shall it apply to any chattels mentioned in any such receipt note, hire receipt, order or other instrument where the manufacturer, bailor or vendor within ten days from the execution of the receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money or a part thereof, shall file with the clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale (*x*).

Section 10 provides as follows:—

Chattels affixed to realty without consent of owner.

(1) Where any goods or chattels subject to the provisions of this Act are affixed to any realty without the consent in writing of the owner of the goods or chattels, such goods and chattels shall notwithstanding remain so subject, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon.

(2) The provisions of this section are to be deemed retroactive, and shall apply to past as well as to future transactions (*y*).

(*w*) R.S.O. (1897) c. 149.

(*x*) R.S.O. (1897) c. 149.

(*y*) R.S.O. (1897) c. 149.

CHAPTER XIV.

RIGHTS AND LIABILITIES OF MORTGAGEE IN POSSESSION.

A mortgagee as between himself and the mortgagor is entitled, if the mortgage deed contains a proviso for quiet enjoyment, as soon as any default is made in payment of principal or interest, or if there be no such proviso, then upon or at any time after the execution of the mortgage, to enter into possession of the land, or if the land be in lease or in the occupation of tenants, to give them notice to pay the rents to him and to receive the rents accordingly (a).

Where the relation of landlord and tenant has been created between the mortgagor and mortgagee by means of an attornment clause in the mortgage deed a mortgagee will be deemed a mortgagee in possession and will be liable to account as such to a subsequent incumbrancer (b).

A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises will not be permitted at the expiration of the term to proceed against the mortgagor as an overholding tenant (c).

In Manitoba it has been held that a mortgagee is not entitled to possession of lands as against a railway company expropriating the lands under legislative power, but is restricted to his claim for compensation (d).

(a) *Moss v. Gallimore* (1779) Doug. 279; 18 R.C. 403; *Keech v. Hall* (1779) Doug. 21; *Moore v. Shelley* (1883) 8 App. Cas. 285; *Doe d. Mowat v. Smith* (1851) 8 U.C.R. 139; *Dunn v. Miller* (1873) 3 N.S.D. 347; *Burnham v. Watts* (1844) 2 Kerr (New Bruns.) 441.

(b) *In re Stockton Iron Furnace Co.* (1879) 10 Ch. D. 335; *Ex parte Punnett* (1880) 16 Ch. D. 235; *Ex parte Hayrison* (1881) 18 Ch. D. 127, at p. 135, but *Bacon V.-C. in Stanley v. Grundy* (1883) 22 Ch. D. 478 decided otherwise.

(c) *In re Reeve* (1867) 4 P.R. 27; see R.S.O. (1897) c. 171; but see *Daubuz v. Lavington* (1884) 13 Q.B.D. 347.

(d) *Manitoba Mortgage and Investment Co. v. Canadian Pacific Railway Co.* (1884) 1 Man. R. 285.

Mortgagee entitled to possession on execution of mortgage in absence of stipulation to the contrary.

Effect of attornment clause : mortgagee in possession.

Mortgagor as overholding tenant.

Mortgagee not entitled to possession of lands expropriated

Mortgagee liable in damages if he takes possession prematurely.

It is usual to insert in the mortgage contract a proviso that the mortgagor may retain possession until default. In case there is such a proviso the mortgagee will be liable in damages if he take possession before default has been made (e).

Effect of taking possession.

If the mortgagee takes possession the mortgagor may redeem without giving notice or paying interest in lieu of notice (f).

Mortgagee may bring action for possession.

If default has been made a mortgagee may take possession if he does so peaceably, without giving notice or serving a demand of possession (ff); and in order to gain an entrance he may break open an outer door of a house in case it is unoccupied or has been vacated (g). If entry be resisted by any person in possession the mortgagee may bring an action to recover possession; and if the mortgage contains an attornment clause whereby the mortgagor becomes tenant to the mortgagee the action may be maintained although no notice to quit has been given, and although the mortgagee may have distrained for rent (h).

Rights of subsequent mortgagees.

Possession of the mortgaged lands can be recovered only by a mortgagee having the legal estate. If a puisne mortgagee take possession his rights are subject to the rights of the prior mortgagee. But a puisne mortgagee may require the prior mortgagee to pay him the surplus rents and profits and may obtain the appointment of a receiver, if a prior mortgagee is not in possession, subject to the prior mortgagee's right to possession whenever he may assert it (i). But where a receiver has been appointed by the court on the application of a subsequent mortgagee,

Where receiver appointed by the court.

(e) *Moore v. Shelley* (1883) 8 App. Cas. 285.

(f) *Bovill v. Endle* [1896] 1 Ch. 648.

(ff) *Doe d. Fisher v. Giles* (1829) 5 Bing. 421.

(g) *Lows v. Telford* (1876) 1 App. Cas. 414; *Doe d. Bryant v. Cunard* (1843) 2 Kerr (New Bruns.) 193.

(h) *Doe d. Garrod v. Olley* (1840) 12 A. & E. 481.

(i) *Parker v. Calcraft* (1821) 6 Madd. 11.

a prior mortgagee cannot recover possession without leave of the court (*j*).

A mortgagee taking possession of the lands is entitled as against the mortgagor to all growing crops and all produce of the lands, and if possession be lawfully demanded by the mortgagee any person refusing possession may be restrained from cutting or removing the crops (*k*). A mortgagee of the land is entitled to take possession of growing crops as against a subsequent chattel mortgagee thereof (*l*). But where a mortgagee of the land purchases the equity of redemption from the mortgagor whereby the mortgage becomes merged, an intervening chattel mortgagee is entitled to the growing crops as against a lessee of the mortgagee of the land (*m*). A mortgagor after default is so far as crops growing upon the mortgaged land are concerned in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land or anyone claiming under him who has entered into possession of the land before the crop is harvested (*n*).

If the property covered by the mortgage consists of business premises the mortgagee is entitled to carry on the business for a reasonable time and to use the name of the mortgagor for that purpose so that the property may be sold as a going concern, but the mortgagee will be liable for gross negligence in management (*o*).

A mortgagee in possession is bound to keep the premises in reasonable repair so far as the rents and profits will

Mortgagee
entitled to
growing
crops.

Chattel
mortgage
on growing
crops.

Mortgagor
after default
cannot give
title to grow-
ing crops
against the
mortgagee.

If mortgage
consists of
business
premises
mortgagee
may con-
tinue the
business.

Mortgagee
in possession
bound to
repair;

(*j*) *Angel v. Smith* (1804) 9 Ves. 335.

(*k*) *Keech v. Hall* (1779) Doug. 21; *Moore v. Shelley* (1883) 8 App. Cas. 285; *Bagnall v. Villar* (1879) 12 Ch. D. 812.

(*l*) *Cameron v. Gibson* (1889) 17 Ont. 233.

(*m*) *Cameron v. Gibson* (1889) 17 Ont. 233.

(*n*) *Bloomfield v. Hellyer* (1895) 22 Ont. App. 232; *Laing v. Ontario Loan and Savings Co.* (1881) 46 U.C.R. 114.

(*o*) *Cook v. Thomas* (1876) 24 W.R. 427; *Chaplin v. Young* (No. 1) (1864) 33 Beav. 330; *Wragg v. Denham* (1836) 2 Y. & C. Ex. 117.

but only to
the extent of
surplus
rents.

Mortgagee
liable only
for necessary
repairs.

Not bound
to expend
money in
rebuilding.

Mortgagee
liable for
waste.

Mortgagee
taking
possession
cannot divest
himself of
liability by
giving up
possession.

enable him to do so, and he will be liable for deterioration occasioned by his gross or wilful negligence (*p*). And where a mortgagee of leaseholds took possession of unfinished buildings and did nothing to complete them whereby the lease became forfeited he was held liable as for wilful default (*q*). But a mortgagee is only liable for neglect to repair if there is a surplus of rents after payment of interest on the mortgage; he is not bound to expend his own money on repairs (*r*). And a mortgagee is not bound to lay out money on the property except for necessary repairs, although he will be allowed in certain cases for improvements (*s*).

And although he may replace decayed buildings by new buildings he is not bound to expend money in rebuilding (*t*).

A mortgagee in possession is also liable for waste, and will be restrained from cutting timber unless the security is scanty (*u*). But where the mortgage security is insufficient the mortgagee is entitled to make the most of the property for the purpose of realizing what is due to him. He may in that case cut timber and confer the power to do so on others, subject always to the right of the mortgagor to call him to account (*v*).

A mortgagee having once taken possession cannot divest himself of liability by giving up possession, and the court will not in such a case appoint a receiver so as to relieve him of liability to account (*w*).

(*p*) *Russel v. Smithies* (1794) 1 Anst. 96; *Wragg v. Denham* (1836) 2 Y. & C. Ex. 117.

(*q*) *Perry v. Walker* (1855) 24 L.J. Ch. 319.

(*r*) *Richards v. Morgan* (1753) 4 Y. & C. Ex. App. 570.

(*s*) *Godfrey v. Watson* (1747) 3 Atk. 517.

(*t*) *Marshall v. Cave* (1825) 3 L.J. Ch. 57; *Moore v. Painter* (1842) 6 Jur. 903.

(*u*) *Hanson v. Derby* (1700) 2 Vern. 392.

(*v*) *Brethour v. Brooke* (1893) 23 Ont. 658; 21 Ont. App. 144; *Millett v. Davey* (1862) 31 Beav. 470.

(*w*) *Re Prytherch, Prytherch v. Williams* (1889) 42 Ch. D. 590.

As soon as a mortgagee has been paid his principal, interest and costs out of the rents and profits he becomes a trustee of the property and must deliver up possession and reconvey, if required, to the person entitled to it (*x*). But he cannot be compelled to give up possession until he has been paid in full.

Mortgagee in possession when paid must reconvey.

The mortgagor can give to the mortgagee no better title than he himself has. If the lands are under lease when the mortgage is made, the reversion only passes to the mortgagee, together with the right to future rents, but not to arrears of rent which have accrued prior to the mortgage unless expressly assigned (*y*). Where, however, the owner of land deposited his title deeds on the 19th of May for the purpose of having a mortgage thereof prepared, which was accordingly made out and executed on the 30th of the same month, and on the preceding day the mortgagor made a lease, of which, however, the mortgagee had no notice, it was held that the lessee could not restrain proceedings under the mortgage (*z*).

Rights of tenants prior to mortgage.

The mortgagee is entitled to the rent by virtue of the mortgage which conveys the reversion, but the tenant may pay the rent to the mortgagor until he receives notice from the mortgagee (*a*).

Mortgagee entitled to rents.

A notice to the tenant requiring him to pay rent to the mortgagee operates as an attornment, and all rents due and unpaid at the time the notice is given and all subsequent rents belong to the mortgagee, who may distrain for the same or recover them in an action against the tenant (*b*). If the tenant voluntarily pays rent to the mortgagor after notice from the mortgagee and

Notice to pay rent operates as an attornment.

(*x*) *Ashworth v. Lord* (1887) 36 Ch. D. 545.

(*y*) *Salmon v. Dean* (1851) 3 Mac. & G. 344.

(*z*) *McKay v. Davidson* (1867) 13 Gr. 498.

(*a*) 4 Anne (1705) c. 16, s. 9.

(*b*) 4 Anne (1705) c. 16, ss. 9 & 10; *Moss v. Gallimore* (1779) Doug. 279.

Tenant paying rent to mortgagor after notice from mortgagee.

No distress
for
rents accruing
prior to
mortgage.

After
mortgage
mortgagor
alone cannot
make valid
lease.

Mortgagee
may confirm
tenancy.

Yearly
tenancy may
be created
between
mortgagor
and
mortgagee.

is afterwards compelled to pay it over again to the mortgagee he cannot recover it back from the mortgagor (c).

A mortgagee cannot distrain, though he may sue, for rents which accrued due prior to the mortgage and which have been assigned to him (d).

If the tenant be in occupation of the land as tenant from year to year he will be entitled to the usual notice to quit before the mortgagee can recover possession (e).

A mortgagee is not liable to a tenant on an affirmative covenant which does not run with the land, even although he may have notice of it (f).

Where the lands are already in mortgage the concurrence of both mortgagor and mortgagee is necessary to a valid lease of the lands unless the lease is made by the mortgagee alone under an express power contained in the mortgage. A mortgagor himself cannot after the making of the mortgage create a lease that will be binding on the mortgagee, and if a tenant under such a lease take possession the mortgagee may at any time eject him without notice (g).

The mortgagee, however, may confirm the tenancy, either expressly or by implication from conduct. Thus, if he accepts or demands rent from the tenant or gives him notice to quit it may be inferred that he has acknowledged the tenancy (h). If the mortgagee gives notice to the tenant to pay rent to him and the tenant pays rent, then in the absence of express agreement a tenancy from year to year is thereby created (i). But if the tenant should,

(c) *Higgs v. Scott* (1849) 7 C.B. 63.

(d) *Flight v. Bentley* (1835) 7 Sim. 149; *Brown v. Metropolitan Counties etc. Society* (1859) 1 E. & E. 832.

(e) *Birch v. Wright* (1786) 1 T.R. 378; see also *Canada Permanent Building and Savings Society v. Rowell* (1860) 19 U.C.R. 124.

(f) *Haywood v. Brunswick etc. Building Society* (1881) 8 Q.B.D. 403.

(g) *Gibbs v. Cruikshank* (1873) L.R. 8 C.P. 454.

(h) *Keech v. Hall* (1779) Doug. 21; *Smith v. Eggington* (1874) L.R. 9 C.P. 145.

(i) *Corbett v. Plowden* (1884) 25 Ch. D. 678.

refuse to pay rent pursuant to the notice no tenancy will be created, and the mortgagee cannot afterwards recover the rent by action or distress according to the terms of the lease made with the mortgagor. The mortgagee's only remedy in that case is eviction (j).

The mortgagee may bring action to recover possession from the tenant, and to recover as mesne profits the rents due under the lease made by the mortgagor; and the tenant is justified in paying rents to the mortgagee if he receive a notice demanding them (k).

A lease made by the mortgagor after the mortgage is, however, not void; and if the mortgagee does not interfere, or if no default is made in payment of the mortgage moneys and the mortgagee does not become entitled to possession, the mortgagor may distrain for the rent due (l), even after the mortgagee has given notice but before payment (m).

Under a mortgage made pursuant to the *Act respecting Short Forms of Mortgages* (o) containing a covenant in the form of Schedule B, clause 7 of that act, that on default the mortgagee shall have quiet possession of the lands, a mortgagee may on default, without giving notice, take possession and make any lease that will not interfere with the mortgagor's right to redeem (p).

There is nothing in this covenant (Schedule B, clause 7) repugnant to the proviso contained in Schedule B, clause 14 of the act, that the mortgagee on default of payment may, after giving notice, enter on and lease or sell the lands. The act contemplated in the proviso is not the mere taking possession in order to keep down the

Mortgagee
may recover
possession
and mesne
profits.

Lease made
by mortgagor
after the
mortgage
not void.

Right of
mortgagee
to lease on
default
without
notice.

Right of
mortgagee
to lease
under power
to lease
after notice.

(j) *Towerson v. Jackson* [1891] 2 Q.B. 484; *Evans v. Elliot* (1838) 9 A. & E. 342.

(k) *Pope v. Biggs* (1829) 9 B. & C. 245.

(l) *Trent v. Hunt* (1853) 9 Exch. 14.

(m) *Carpenter v. Parker* (1857) 3 C.B.N.S. 206; *Wilton v. Dunn* (1851) 17 Q.B. 294.

(o) R.S.O. (1897) c. 126.

(p) *Brethour v. Brooke* (1893) 23 Ont. 658; 21 Ont. App. 144.

interest, which may be done immediately on default and without notice, but the entering on the lands to lease or sell in such wise that the mortgagor's right to redeem will be postponed or destroyed (q).

Mortgagee
cannot lease
a house for
years except
under a
power.

Rents may
be garnished
by creditor
of mortgagor

A mortgagee, if not empowered by the terms of the contract, cannot make a lease of a house for years, so as to bind the mortgagor, unless this course is absolutely necessary in order to avoid apparent loss (r).

Rents accruing due by tenants of a mortgagor may be garnished by a judgment creditor of the mortgagor, and when the order is served on the tenants between the gale days and before the rent is actually due the creditor is entitled to an order for payment when the rent becomes due; but it is doubtful if such rents can be garnished as against a mortgagee (s). But rents which have become due to a mortgagor may be garnished before notice has been given by the mortgagee to the tenant to pay the rent to him (t).

Mortgagee
in possession
liable to
account:
(1) for rents
actually
received;
(2) for rents
which he
might have
received but
for wilful ✓
default.

A mortgagee who enters as such into possession or into receipt of the rents and profits of the mortgaged property must account not only for what he has actually received, but for what he might have received but for his wilful default; but if a mortgagee enters into possession or receipt of rents and profits in another character, he cannot be made liable as a mortgagee in possession (u). If the mortgagee enters into actual occupation of the lands himself he will be accountable for an occupation rent fixed at the value the lands are proved to be worth (v). A mortgagee is so accountable to the mortgagor, and also to

(q) *Brethour v. Brooke* (1893) 23 Ont. 658; 21 Ont. App. 144; *Doe d. Garrod v. Oiley* (1840) 12 A. & E. 481; *Lows v. Telford* (1876) 1 App. Cas. 414.

(r) *Hungerford v. Clay* (1722) 9 Mod. 1.

(s) *Massie v. Toronto Printing Co.* (1887) 12 P.R. 12.

(t) *Patterson v. O'Reilly* (1882) 10 L.R. Ir. 304.

(u) *Parkinson v. Hanbury* (1867) L.R. 2 H.L. 1; 18 R.C. 411.

(v) *Lord Trimleston v. Hamill* (1810) 1 Ball & B. 377.

subsequent mortgagees and to creditors and others claiming under the mortgagor. A mortgagee in possession is liable to a subsequent incumbrancer if after notice from him he pays the surplus rents and profits to the mortgagor (*w*).

If a mortgagee in possession execute an assignment of his mortgage he will continue to be liable for the rents and profits if the assignee fail to account for them; but this does not apply if the assignment is made pursuant to an order of the court (*x*). For this reason a mortgagee in possession will not be required to give an assignment of his mortgage at the instance of the mortgagor or a subsequent incumbrancer (*y*).

The assignee of a mortgagee in possession is likewise accountable to the mortgagor and those claiming under him not only for the rents and profits received by himself but also for those received by the mortgagee and intermediate assignees (*z*). Where one of several devisees claimed to be solely entitled and mortgaged the property, and the mortgagees entered into the receipt of the rents, it was held that they must account to the other devisees for their shares of the rent (*a*).

A mortgagee, his power of sale on default having arisen, sold the mortgaged premises ostensibly to a third person but in reality to himself. Subsequently he sold a portion of the premises to a third person for an amount in excess of the mortgage debt; and he continued in possession of the remaining part, and received rent. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus from the second

Mortgagee
liable after
assignment.

Assignee of
mortgagee
in possession
liable for
what the
mortgagee
received.

Mortgagee
after sale to
himself
liable to
account.

(*w*) *Berney v. Sewell* (1820) 1 J. & W. 647.

(*x*) *Hall v. Heward* (1886) 32 Ch. D. 430; *National Bank of Australasia v. United Hand-in-Hand &c. Co.* (1879) 4 App. Cas. 391.

(*y*) R.S.O. (1807) c. 121, s. 2, sub-s. 3.

(*z*) *Chambers v. Goldwin* (1804) 9 Ves. 254.

(*a*) *McIntosh v. Ontario Bank* (1872) 16 Gr. 155.

sale, together with the rent and interest on both sums and costs (b).

A derivative mortgagee is bound to account to his assignor for all profits made by him. Thus where a derivative mortgagee by representing himself to be the absolute mortgagee obtained an assignment of the equity of redemption which he subsequently re-sold at a profit, he was held bound to account for the profits so made (c).

Mortgagee purchasing equity of redemption.

In a redemption suit by the second mortgagee against the first in which it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession and had cut and removed timber to a greater value than the amount due on his mortgage, it was held that he was bound to account for the value of only such timber and occupation rent as was taken or received by him as mortgagee, and not for what he took or received as owner of the equity of redemption, but that the second mortgagee might ask for a receiver (d).

The rule is that when a mortgagee enters into possession he does so for the purpose of recovering both his principal and interest. Equity regards the estate only as a security for the money due on the mortgage, and the court requires the mortgagee to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor, who is in equity the person entitled to it. Nevertheless the mortgagee will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same (e).

Occupation rent.

As between mortgagor and mortgagee there is nothing to prevent the mortgagee taking possession at a fair and

(b) *Mitchell v. Kinnear* (1897) 1 N.B. Eq. 427.

(c) *Wilkins v. McLean* (1885) 10 Ont. 58; 13 Ont. App. 467; 14 S.C.R. 22.

(d) *Steinbock v. Brown* (1865) 11 Gr. 114.

(e) *Merriam v. Cronk* (1874) 21 Gr. 60; *Waddell v. McColl* (1868) 14 Gr. 211; *Penn v. Lockwood* (1850) 1 Gr. 547.

reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term. A subsequent incumbrancer, however, who becomes such before the first mortgagee enters into possession, is not bound by such an arrangement; and the Master may charge the first mortgagee with a fair occupation rent although it exceeds that stipulated for (f). Unless a mortgagee has been in actual occupation of the property he will not be charged with an occupation rent; but he may be chargeable on the ground of wilful default (g).

Where a mortgagee is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment; so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent only to the date of the Master's report, and had since continued in possession, the final order for foreclosure was refused (h).

The holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but asserted no claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave. The brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and it was held that such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property (i).

A mortgagee in possession may be charged with rents actually received, or which, but for wilful neglect and default, he might have received; or he may be charged with an occupation rent when he has been in actual

Mortgagee
not liable to
occupation
rent unless
he has been
in actual
occupation.

Occupation
rent should
be charged
to day
appointed
for payment.

(f) *Court v. Holland* (1881) 29 Gr. 19; *Gilmour v. Roe* (1874) 21 Gr. 284.

(g) *Shepard v. Jones* (1882) 21 Ch. D. 469.

(h) *Pipe v. Shafer* (1868) 1 Chy. Ch. 251.

(i) *Paul v. Johnson* (1866) 12 Gr. 474.

occupation, using and enjoying the mortgaged property in the place of a tenant; in the latter case he is charged with a fair rental, such as a tenant might be expected to give, unless it is shown that he actually made a larger profit (*k*).

A mortgagee taking possession and evicting a tenant of the mortgagor who is willing to remain and pay rent will be held accountable for the rents from that time (*l*). Where after default was made in payment of a mortgage, a tenant put in possession by the mortgagor promised to pay the mortgagee rent, but failed to do so, it was held that the mortgagee was not chargeable with such rent (*m*).

Mortgagee
in possession
entitled to
credit for
payments
properly
made.

A mortgagee in possession is entitled to credit in his account of rents and profits for payments properly made for purposes incident to his possession (*n*). The mortgagee will not without the consent of the mortgagor be allowed for substantial repairs unless actually necessary, nor for improvements which do not increase the value of the property (*o*). A second mortgagee will not be allowed for improvements as against a first mortgagee (*p*).

Interest on
amounts paid
for repairs
and improve-
ments.

Interest may be allowed on amounts paid for necessary repairs and lasting improvements (*q*).

The principles upon which improvements by a mortgagee in possession may be allowed for are considered in *Paul v. Johnson* (*r*). Where the mortgagee in possession had planted fruit and ornamental trees suitable for carrying out improvements commenced by the mortgagor, he was allowed the cost price of the same and a reasonable

(*k*) *Coldwell v. Hall* (1862) 9 Gr. 110. In this case the principles upon which occupation rent is charged are discussed.

(*l*) *Penn v. Lockwood* (1850) 1 Gr. 547.

(*m*) *Waddell v. McColl* (1868) 14 Gr. 211.

(*n*) *White v. City of London Brewery Co.* (1889) 42 Ch. D. 237.

(*o*) *Sandon v. Hooper* (1843) 6 Beav. 246; *Henderson v. Astwood* [1894] A.C. 150.

(*p*) *Landowners &c. Co. v. Ashford* (1880) 16 Ch. D. 412.

(*q*) *Eyre v. Hughes* (1876) 2 Ch. D. 148.

(*r*) (1866) 12 Gr. 474.

amount for care and cultivation, but not the value thereof at the time of redemption (s).

A mortgagee in possession of a grist mill and other property erected a carding and fulling mill. This was disallowed to him as being an improvement that a mortgagee could not make without consent (t).

In a case where the mortgagors released their equity of redemption to the mortgagee, and the mortgagee subsequently signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements made by her, it was held in a suit for redemption that the mortgagee was entitled to recover for all permanent and lasting improvements, even although the estate might not have been increased in value to an amount equal to the sum expended thereon (u).

Agreement
by
mortgagor to
pay all costs
of improve-
ments.

The owner of certain lands after a treaty for a loan thereon conveyed the lands absolutely to the person making the loan and received back a bond conditioned to reconvey the property on payment of a certain sum at the end of two years. Default was made in such payment. The court declared the deed to have been made as security only, the bond to reconvey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof; but under the circumstances the court charged the mortgagee with such rents and profits as were actually received, or an occupation rent, if in actual possession, not with such rents as might have been received; and the court also allowed him for repairs and permanent improvements (v).

Where a mortgagee is charged with rents and profits received from improvements made by himself he should

(s) *Paul v. Johnson* (1866) 12 Gr. 474.

(t) *Kerby v. Kerby* (1856) 5 Gr. 587.

(u) *Brotherton v. Hetherington* (1876) 23 Gr. 187.

(v) *Bullen v. Renwick* (1862) 9 Gr. 202.

be allowed the expense of such improvements to a corresponding amount (*w*).

Improvements made under the belief of absolute ownership are allowed more liberally than to a person who makes improvements knowing that he is but a mortgagee (*x*).

Mortgagee
not entitled
to compensa-
tion for
personal
trouble :
but may
appoint
agent to
collect rents.

A mortgagee is not allowed to charge any commission or remuneration for his personal trouble, even although the mortgage deed contains a stipulation purporting to authorize him to make such a charge (*z*). Although a mortgagee who has taken possession will not be allowed compensation for his care and trouble in collecting the rents, he may appoint an agent for that purpose and will be allowed reasonable remuneration for his services (*a*).

Where it is found that the mortgagee in possession on taking his accounts has suffered a loss by reason of the rents not being sufficient to pay the expenses of management, he is entitled to be allowed out of the proceeds of the sale of the property what he has lost (*b*).

Money paid
to redeem
land sold for
taxes is a
lien on the
land.

In taking the account in the Master's office the plaintiff as assignee of the mortgage claimed to be entitled to moneys paid by the mortgagee to redeem the mortgaged lands which had been sold for arrears of taxes. It was held that money so paid is a lien on the land, and the mortgagee has a right to claim the same as a just allowance, with interest at six per cent. from the date of payment (*c*).

Costs of
unsuccessful
legal pro-
ceedings.

The general rule is that a mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings,

(*w*) *Constable v. Guest* (1858) 6 Gr. 510.

(*x*) *Curroll v. Robertson* (1868) 15 Gr. 173; *McLaren v. Fraser* (1870) 17 Gr. 567.

(*z*) *Eyre v. Hughes* (1876) 2 Ch. D. 148.

(*a*) *French v. Baron* (1740) 2 Atk. 120; *Godfrey v. Watson* (1747) 3 Atk. 517; *Freehold Loan Co. v. McLean* (1893) 9 Man. R. 15.

(*b*) *Bompson v. King* (1886) 33 Ch. D. 279; *Rice v. George* (1872) 19 Gr. 174.

(*c*) *Wiley v. Ledyard* (1883) 10 P.R. 182.

ings at law instituted by himself and not undertaken with the approval of the mortgagor (*d*).

A mortgagee may be estopped as against a person inquiring of him the amount due on his mortgage, with a view to purchasing the equity of redemption, from claiming more than the amount then claimed (*e*). But such representations if made to a person not known to be intending to purchase, or to deal in respect of the equity of redemption, are not binding on the mortgagee although acted upon (*f*).

Where it is found on taking the accounts that the net amount received for rents exceeds the amount due for interest on the mortgage debt the court may direct that the surplus rents and profits be applied in reduction of the principal, or in other words that the account be taken with rests (*g*).

The mortgagee will be charged with interest on the surplus of rents and profits remaining in his hands after payment of his debt (*h*).

A mortgagee in possession whose mortgage is in arrear should not be charged with rests on rents received by him, until he has been paid in full (*i*). Where it is necessary that a mortgagee should take possession for his own protection, he is not chargeable with rests, and this even although the mortgage was not in arrear (*j*).

A tenant of a mortgagor took an assignment of the mortgage after the mortgagor's death, and as the representatives of the mortgagor had no means of paying the debt he agreed with the widow that she and her children

Estoppel of
mortgagee.

Account may
be taken
with rests.

Interest on
surplus rents
after mort-
gage paid.

(*d*) *Wells v. The Trust and Loan Co.* (1884) 9 Ont. 170; 20 C.L.J. 407.

(*e*) *Dominion Savings & Investment Society v. Kittridge* (1876) 23 Gr. 631.

(*f*) *Moffatt v. Bank of Upper Canada* (1856) 5 Gr. 374.

(*g*) *Thorneycroft v. Crockett* (1848) 2 H.L.C. 239.

(*h*) *Ashworth v. Lord* (1887) 36 Ch. D. 545.

(*i*) *Coldwell v. Hall* (1862) 9 Gr. 110; 7 U.C.L.J. (O.S.) 42; 8 U.C.L.J. (O.S.) 93.

(*j*) *Gordon v. Eakins* (1869) 16 Gr. 363.

should occupy the dwelling house and four acres of the mortgaged property; and that he himself should occupy the residue at a rental of \$170, and should pay \$40 a year to the widow, and apply the residue of the rent on the mortgage. In a suit for redemption by a purchaser of the equity of redemption it was held that the defendant was not chargeable with the \$40 a year paid to the widow, nor with rests, though the rent for which he was accountable exceeded the interest (*k*).

If a mortgagee retains possession of the property after being paid in full the general rule is to charge him with interest and rests in respect of his subsequent receipts; *a fortiori* is such a charge proper where a mortgagee resists the mortgagor's right to redeem (*l*).

Mode of taking account.

In taking the accounts against a mortgagee in possession it is usual to take an account of the amount due under the mortgage and an account of the rents and profits chargeable to the mortgagee, and to apply the amount of the latter account in reduction successively of the interest, then of the amount advanced for costs and improvements, and lastly of the principal.

Appropriation of payments.

Payments made on account are to be appropriated (1) as the debtor directs at the time of payment, or (2) where there is no direction by the debtor, as the creditor directs; and (3) where neither makes any direction the law will apply the payments on the older debt, or as may be just (*m*).

A mortgage given to secure a floating balance is not discharged by payments made on account, so long as the dealings between the parties continue and any balance remains due in respect thereof, even although the payments exceed in amount the debt due when the mortgage

(*k*) *Gordon v. Eakins* (1869) 16 Gr. 363.

(*l*) *Crippen v. Ogilvie* (1869) 15 Gr. 568.

(*m*) *Wilson v. Rykert* (1886) 14 Ont. 188.

was given or the amount of the debt mentioned in the mortgage (*n*).

The account of rents and profits should set out the full particulars of all receipts and not merely a lump sum equal to the net receipts (*o*).

Where rents are received after judgment the mortgagee must account on affidavit for the amount received up to the time when matters are finally adjusted (*p*).

Account of rents should contain all items of moneys received and paid.

(*n*) *Cameron v. Kerr* (1878) 3 Ont. App. 30; *Griffith v. Crocker* (1891) 18 Ont. App. 370.

(*o*) *Noyes v. Pollock* (1885) 30 Ch.D. 336; but see *Phillipps v. Prout* (1898) 12 Man. R. 143, where it was held that the account should show only the net proceeds of the rents and profits leaving the mortgagor to surcharge.

(*p*) *Lord Penrhyn v. Hughes* (1799) 5 Ves. 99; *Oxenham v. Ellis* (1854) 18 Beav. 593.

CHAPTER XV.

SALE UNDER POWER OF SALE.

i. *Origin and Development of Power of Sale.*

Mortgage at
common
law.

At common law a mortgage created strictly an estate upon condition. A feoffment was made to the mortgagee with a condition that upon payment of the mortgage debt and interest at the time and place appointed it should be lawful for the mortgagor to re-enter. On livery made the mortgagee became the legal owner of the land subject to the condition. If the condition was performed the mortgagor re-entered and was in as of his old estate; but if the condition was not performed the mortgagee's estate became absolute and indefeasible, and the mortgagee was then at liberty to sell or otherwise deal with the land free from any right of the mortgagor (*a*).

Mortgage in
equity.

But courts of equity, while they could not alter the legal effect of the forfeiture, operated on the conscience of the mortgagee, acting *in personam* and not *in rem*, and declared it to be contrary to conscience and reason that the mortgagee should retain absolutely what was intended as a mere security; that the forfeiture at common law was in the nature of a penalty from which equity should relieve; and that, until foreclosed by a decree of the court, the mortgagor had a right to redeem upon payment of principal, interest and costs.

Thus to enable the mortgagee to hold the lands absolutely or to make a good title on sale it became necessary to foreclose the mortgagor's equity of redemption.

Until the right to a judicial sale was introduced by

(*a*) See *Nesbitt v. Rice* (1864) 14 U.C.C.P. 409.

statute the only relief that the courts afforded the mortgagee was foreclosure (b).

The necessity thus imposed upon the mortgagee of foreclosing the equity of redemption—a tedious process where there were several subsequent incumbrances and therefore successive periods for redemption—led to the introduction by conveyancers of the power of sale, a remedy intended to afford a simpler and more expeditious mode of getting rid of the mortgagor's equity of redemption and of realizing the mortgage debt.

Courts of equity, however, did not view powers of sale with favour but regarded them as opposed to the equitable doctrine that the mortgagor had an equity of redemption which could not be got rid of without a decree of foreclosure. Thus in *Croft v. Powel* (c) the mortgagor was let in to redeem several years after the exercise of the power, and in *King v. Parish of Edington* (d) Lord Kenyon, C.J. said:—

"In mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises without the concurrence of the mortgagor; but a court of equity would, I believe, control the exercise of that power."

In *Corder v. Morgan* (e), however, the validity of a power of sale was expressly affirmed, and it was held that the mortgagee might exercise such a power, without the concurrence of the mortgagor, though the latter had covenanted with the mortgagee to join in a sale.

It may now be considered as settled that the power of sale is a necessary and proper incident of the ordinary mortgage deed. This point has frequently arisen in England in cases in which the question before the court was whether a power to mortgage authorized the making

Origin of
power of
sale.

Powers of
sale not
favoured at
first by
courts of
equity;

but ultim-
ately
recognized.

(b) 15 & 16 Vict. Imp. (1852) c. 86 enabled the court in England to direct a sale in lieu of foreclosure. As to the introduction of this practice in Upper Canada see *Meyers v. Harrison* (1850) 1 Gr. 449 at p. 455.

(c) Com. (1738) 603.

(d) (1801) 1 East 288.

(e) (1811) 18 Ves. 344.

of a mortgage containing a power of sale. The authorities have conflicted, but the following extract from the judgment of Malins, V-C. in *Re Chawner's Will* (*f*) may be taken as correctly expressing the present state of the law:—

"I am of opinion that a power of sale is a necessary incident to a mortgage, and that when a testator says that a sum of money is to be raised by mortgage he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that the mortgage may contain what mortgages in general do contain, namely, a power of sale. I entirely agree with what the Master of the Rolls said in *Cook v. Dawson* (*g*) that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of sale (*h*)."

On the other hand in a suit by a vendor for specific performance, where the vendor was ordered to execute a deed and the vendee to execute a mortgage, Spragge, V-C. expressed an opinion that it would be improper to insert a power of sale in the mortgage (*i*). But in *Ashton v. Corrigan* (*j*) a decree was made for specific performance of a contract to execute a mortgage containing an immediate power of sale.

The power of sale thus came to be recognized by the courts as a proper provision to be inserted in a mortgage deed.

Power of
sale recog-
nized by the
legislature.

It has been further recognized by the legislature. The form of mortgage provided by the *Act respecting Short Forms of Mortgages* (*k*) includes a power of sale. And by the *Act respecting Mortgages of Real Estate* (*l*) an implied power of sale is given to mortgagees. The provisions of these statutes will be considered presently.

(*f*) (1869) L.R. 8 Eq. 569.

(*g*) (1861) 29 Beav. 123 at p. 128.

(*h*) *Bailey v. Abraham* (1849) 14 L.T. 219, Q.B.; *Bridges v. Longman* (1857) 24 Beav. 27.

(*i*) *McKay v. Reed* (1864) 1 Chy. Ch. 208.

(*j*) (1871) L.R. 13 Eq. 76; see *Hermann v. Hodges* (1873) L.R. 16 Eq. 18.

(*k*) R.S.O. (1897) c. 126, Schedule B.

(*l*) R.S.O. (1897) c. 121, s. 18.

ii. *Form of Power of Sale.*

A power of sale may be conferred in various ways. It may be in the form of a trust for reconveyance on payment of the mortgage debt on the day appointed, and in default of payment for sale. Or the estate may be limited to the use of the mortgagee for a term of years with a proviso for redemption, and subject thereto to the use of trustees in fee simple upon trust to sell. The estate may also be limited at once to trustees in fee simple to sell if the mortgage moneys are not paid by the appointed time, with a proviso for redemption.

The appointment of third persons as trustees for sale is, however, not desirable, as this course may occasion delay, inconvenience and greater expense. And a mortgagee exercising the power of sale will not be subject to the same restraint as a trustee. Thus where the power of sale was vested in a trustee the court, on the application of the mortgagor, restrained the sale until the trustee should give notice to both the mortgagee and the mortgagor, upon the ground that it was the duty of the trustee to attend to the interests of both mortgagee and mortgagor, but in the same case a motion to restrain the mortgagee from proceeding without notice, made under the apprehension that the power was vested in the mortgagee, was refused (*m*).

Trust for
sale not
desirable.

The power of sale is usually created by conveying the lands to the mortgagee in fee with a proviso for redemption, and with a further proviso that, if default be made in payment, it shall be lawful for the mortgagee, his heirs, executors, administrators or assigns, after giving notice, to enter on and lease or sell the lands. The form provided by the *Act respecting Short Forms of Mortgages* (*n*) is as follows:—

(m) Anon (1821) 6 Madd. 10.

(n) R.S.O. (1897) c. 126, Schedule B, clause 14.

heirs, executors or administrators, shall make default in any payment of the said money or interest or any part of either of the same, according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained, and —— calendar months shall have thereafter elapsed without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence), it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators or assigns, after giving written notice to the said mortgagor, his heirs or assigns, of his intention in that behalf, either personally or at his or their usual or last place of residence within this Province not less than —— previous, without any further consent or concurrence of the said mortgagor, his heirs or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part thereof as he shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, or any part or parts thereof, with the appurtenances, by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid, unless the same shall happen by reason of his wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements, hereditaments and premises, in case he shall take possession of the same on any default as aforesaid, and after such sale or sales shall stand and be possessed of and interested in the moneys to arise and be produced by such sale or sales, or which shall be received by the mortgagee, his heirs, executors, administrators or assigns, by reason of any insurance upon the said premises or any part thereof, upon trust in the first place to pay and satisfy the costs and charges of preparing for making sales, leases and conveyances as aforesaid, and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns shall bear, sustain, or be put to for taxes, rent, insurances and repairs, and all other costs and charges which may be incurred in and about the execution of any of the trusts in him hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs or assigns, convey and assure unto the said mortgagor, his heirs or assigns, or to such person or persons as he shall direct and appoint, all such parts

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of the said lands, tenements, hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs, executors, administrators or assigns, in the meantime, so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; Provided always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale and other the powers and provisions contained in these presents, the said mortgagee, his heirs, executors, administrators or assigns, shall have and be entitled to his right of foreclosure of the equity of redemption of the said mortgagor, his heirs and assigns in the said lands, tenements, hereditaments and premises as fully and effectually as he might have exercised and enjoyed the same in case the power of sale, and the other former provisoos and trusts incident thereto had not been herein contained.

The short form equivalent to this form of power of sale is as follows :—

14. Provided that the said mortgagee on default of payment for _____ months may on _____ notice enter on and lease or sell the said lands (nn).

Where a mortgage is under the *Land Titles Act* the exercise of the power of sale is regulated by the following section :—

Power of
sale under
Land Titles
Act.

38. Subject to any entry to the contrary on the register, the registered owner of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land (that is, the interest therein which is the subject of the charge), or any part of such land, in the same manner as if he were the registered owner of the land, to the extent of the interest therein aforesaid (o).

In the case of a mortgage of lands in the North-West Territories the mortgagee's right to sell is governed by the following sections of the *Land Titles Act, 1894* (57 & 58 Vict. (D.) chapter 28 :—

Power of
sale in
North-West
Territories.

74. A mortgage or encumbrance under this Act shall have effect as security, but shall not operate as a transfer of the land thereby charged; and if default is made in payment of the principal sum, interest, annuity or rent-charge, or any part thereof thereby secured, or in the observance of any covenant expressed in any mortgage or encumbrance registered under this Act, or that is herein declared to be implied in such instrument, and such default is continued for the space of one calendar month, or for such longer period of time as is expressly limited for that purpose in such instrument, the mortgagee or encumbrancee may, by direction of the judge, give to the

(nn) R.S.O. (1897) c. 126, Schedule B, clause 14.

(o) R.S.O. (1897) c. 138, s. 38.

mortgagor or encumbrancer notice in writing to pay, within a time to be specified in the notice, the money then due or owing on the mortgage or encumbrance, or to observe the covenants therein expressed or implied, as the case may be, and that all competent rights and powers will be resorted to unless such default is remedied or, where the mortgagor or encumbrancer cannot be found, may give the notice in that behalf to the mortgagor or encumbrancer in such manner as the judge, on summary application, *ex parte* directs.

75. In default of compliance with the terms of such notice the mortgagee or encumbrancee, under and subject to the direction of the judge, may sell the land so mortgaged or encumbered, or any part thereof, and all the estate or interest therein of the mortgagor or encumbrancer, and, either altogether or in lots, by public auction or by private contract, or by both modes of sale, and subject to such conditions as the judge directs, and to make and execute all instruments as are necessary for effecting the sale thereof; and all sales, contracts, matters and things hereby authorized shall be as valid and effectual as if the mortgagor or encumbrancer had made, done or executed the same: and the receipt or receipts in writing of the mortgagee or encumbrancee shall be a sufficient discharge to the purchaser of the land, estate or interest, or of any portion thereof, for so much of his purchase money as is thereby expressed to be received: and no purchaser shall be answerable for the loss, misapplication or non-application, or be obliged to see to the application of the purchase money by him paid, nor shall he be concerned to inquire as to the fact of any default having been made or notice having been given as aforesaid; and before a certificate of title shall be granted to the purchaser, the purchase money arising from the sale of the land shall be paid into Court by the purchaser, and shall be, by order of the judge, applied: first, in payment of the expenses occasioned by the sale and such costs as may be ordered to be paid by the judge; secondly, in payment of the moneys which are then due or owing to the mortgagee or encumbrancee; thirdly, in payment of subsequent mortgages or encumbrances, if any, in the order of their priority; and the surplus, if any, shall be paid to the mortgagor or encumbrancer, as the case may be; and thereupon such sale shall be confirmed by the judge.

iii. *Statutory Power of Sale.*

Statutory
short form
of power,
if varied,
does not
extend to
assigns.

Section 2 of Schedule B of the Ontario Act, R.S.O. (1897) chapter 126, provides that the parties may introduce into, or annex to any of the abbreviated forms any express exceptions from or other express qualifications thereof; and the like exceptions and qualifications shall be taken to be made from or in the corresponding extended forms. But to obtain the benefit of the extended forms in Column Two it is necessary to use the abbreviated forms of words in Column One corresponding thereto.

The extended form of the power of sale in the *Short Forms Act* (*p*), provides that the power may be exercised

(*p*) Schedule B, clause 14.

by the assigns of the mortgagee; but if the extended form is not available the power is personal to the mortgagee and does not pass to his assignee. For while the assignment of the mortgage conveys the land and transfers the mortgage debt the assignee cannot exercise the power of sale, unless it is expressly reserved to him (q).

In *Re Gilchrist and Island* (r) the power of sale was in the following words:—"Provided that the said mortgagee, on default of payment for two months, may without giving any notice, enter on and lease or sell the said lands;" and it was held that this was neither an exception from or a qualification of the form provided by the statute, but an abolition of one of its most important forms, that is, that written notice should be given to the mortgagor. The power, therefore, was personal to the mortgagee and could not be exercised by his assigns.

In *Re Green and Artkin* (s) the power of sale was in these words:—"Provided that the said mortgagee on default of payment for one month may on giving notice in writing enter on and lease or sell the said lands." Ferguson, J. held that the substitution of the word "month" for "months" was not a material variation and that the assignee of the mortgage could exercise the power of sale.

Where the proviso was that the mortgagee, on default of payment for one day, might without any notice enter on and lease or sell the lands, the court was divided in opinion as to its effect. Rose, J. dissented from *Re Gilchrist and Island* (t) and was of opinion that the power was operative under the short forms act, while Street, J. held that the form used was not operative, and that the words,

(q) *Emmett v. Quinn* (1882) 7 Ont. App. 306; *Re Gilchrist and Island* (1886) 11 Ont. 537; *Bradford v. Belfield* (1828) 2 Sim. 264; *Cooke v. Crawford* (1842) 13 Sim. 91; *Titley v. Wolstenholme* (1844) 7 Beav. 425; *Re Morton and Hallett* (1880) 15 Ch. D. 143, C.A.; *Re Rumney and Smith* (1897) 2 Ch. 351.

(r) (1886) 11 Ont. 537.

(s) (1887) 14 Ont. 697.

(t) (1886) 11 Ont. 537.

therefore, must be confined to their actual meaning apart from the statute (*u*).

In *Barry v. Anderson* (*v*) the words used were as follows:—"Provided that the said mortgagees on default of payment for one month, may on ten days' notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice;" and it was held, Burton, J. A. dissenting, that this form was within the act, and that the power of sale could be exercised by the assignees of the mortgagee.

Osler, J.A. said:—

"There is first the usual short form clause of power of sale after notice which must be read, in accordance with the Act and clause 3 of the directions, R.S.O. (1887) ch. 107, Schedule B., Form 14, in the extended form, the substitution of the word "month" for "months," if important, being in my humble judgment an express qualification within the meaning of the Act, of Form 14 in the first column of the schedule. Then follows a separate clause: "Provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice." This clause is to be read just as if the previous clause had been set forth in its extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column 2 of the schedule, the extended form. Reading the second clause as following the extension it declares that in the event it provides for, the said power of sale and entry may be acted upon without notice. All the terms of that power therefore, except as varied by the terms of the 2nd clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee."

Necessity for entry where extended form not available.

In *Clark v. Harvey* (*w*) the question was discussed whether it was necessary that an entry should be made on the lands before exercising the power of sale. The extended form in the act provides that the mortgagee may exercise the power of sale "whether in or out of possession." Rose, J. was of opinion that the form used in the

(*u*) *Clark v. Harvey* (1888) 16 Ont. 159.

(*v*) (1891) 18 Ont. App. 247.

(*w*) (1888) 16 Ont. 159.

mortgage deed in this case was operative under the act, and that therefore the mortgagee could sell "whether in or out of possession." But Street, J. (*x*) held that the form was inoperative and that the mortgagee was confined strictly to the words used by him which provided that he might enter on and lease or sell the said lands, and that therefore the power did not arise or at all events could not be exercised until entry made on the lands.

In *Pottruff v. Tweedle* (*y*) Robertson, J. held that it was not necessary that the mortgagee should make an entry before exercising the power of sale.

In view of this diversity of judicial opinion it is important that the short forms provided by the act should be strictly followed; or if another form is used the power should be expressly extended to the assigns of the mortgagee.

Where it is desired to provide for sale without notice Power of
sale without
notice. an independent clause such as the following may be added to the short form provided by the act:—

"Provided that the said mortgagee on default of payment for _____ months may on _____ notice enter on and lease or sell the said lands. And provided also that if default be made in payment of either principal or interest for _____ months after any payment of either falls due the said mortgagee, his heirs, executors, administrators and assigns may exercise the said powers of entering, leasing and selling, or any of them, without any notice" (*z*).

In consequence of the decision in *Re Gilchrist and Island* (*a*) the following was enacted by the Ontario Legislature:—

1. Whenever a mortgage purporting to be made in pursuance of the *Act respecting Short Forms of Mortgages* contains a power of sale which provides for a sale without notice, the mortgagee, his heirs,

(*x*) Referring to Jones on Mortgages 3rd Ed. Vol. II. s. 1782 and cases there cited.

(*y*) Unreported, referred to in *Anderson v. Hanna* (1889) 19 Ont. 58.

(*z*) See Leith's Real Property Statutes 424 n.

(*a*) (1886) 11 Ont. 537.

executors, administrators or assigns may take proceedings to sell under and sell and have the benefit of the provisions of Part II. of this Act as fully and effectually as if the mortgage had not contained a power of sale. This sub-section shall be held to apply to all mortgages whether heretofore or hereafter made (b).

Confirmation
of sale by
assignee
of mortgage.

By the *Mortgage Amendment Act, 1888* (c) the time within which a sale might be questioned, if made by the assignee of a mortgage under the power of sale, was limited to two years. That provision is now contained in the *Act respecting Mortgages of Real Estate* (cc) :—

34. No sale made prior to the 23rd day of March, 1888, shall be declared to be invalid on the ground, or by reason only of the same having been made in pursuance of a power of sale contained in a mortgage where such power has been exercised by an assignee of such mortgage instead of the original mortgagee unless within two years after the making of any such sale, proceedings have been taken to declare the same to be invalid or irregular; but nothing in this section contained shall be deemed or construed to confirm any such sale which for any other reason or any other ground might be set aside, or declared irregular or invalid; nor shall anything herein contained affect any proceeding, suit or matter, adjudged or determined before or pending at the said date or brought within three months thereafter.

By the *Act respecting Mortgages of Real Estate* (d), it is enacted as follows :—

29. (1) Whenever a mortgage made in pursuance of the *Act respecting Short Forms of Mortgages* contains a power of sale in the form No. 14, in Column One of Schedule B. to the said Act, the mortgagee, his heirs, executors, administrators or assigns may, in exercising the said power in lieu of taking the proceedings provided for by the said form No. 14, Column Two, take proceedings under and have the benefit of the provisions of Part II. of this Act, except that such power shall not be exercisable until after at least four months' default and at least two months' notice, or such longer periods as may by the power contained in such mortgage be fixed therefor, and the said Part II. shall apply to a sale made under such power.

Thus where a mortgage is made in pursuance of the short forms act and contains a power of sale, the person exercising the power may avail himself of the provisions of the *Act respecting Mortgages of Real Estate* (e) in either of the following cases :—

(1) Where the power of sale is in conformity with the

(b) 53 Viet. (1890) c. 27, s. 1, now R.S.O. (1897) c. 121, *Act respecting Mortgages of Real Estate*, s. 29, sub-s. 2.

(c) 51 Viet. c. 15, s. 5.

(cc) R.S.O. (1897) c. 121, s. 34.

(d) R.S.O. (1897) c. 121.

(e) R.S.O. (1897) c. 121.

short forms act, the mortgagee his executors, administrators or assigns may on four months' default and two months' notice, unless the terms of the power fix longer periods, take the proceedings prescribed by the *Act respecting Mortgages of Real Estate* in lieu of the proceedings provided by the short forms act.

(2) Where the power of sale is not in conformity with the short forms act by reason of its providing for sale without notice, the mortgagee, his heirs, executors, administrators or assigns may take the proceedings provided by the *Act respecting Mortgages of Real Estate*.

There is no remedy where a mortgage containing a power of sale is made in pursuance of the short forms act, and the power is defective for any reason other than because it provides for sale without notice. Nor is there any remedy where a mortgage with power of sale is not made in pursuance of the short forms act and the power of sale is for any reason defective.

Prior to the passing of *Lord Cranworth's Act* (*f*), in order that a mortgagee might sell the mortgaged lands without judicial proceedings it was necessary that a power of sale should be given expressly by the mortgage deed. By that act a power of sale was implied in certain cases. The sections of *Lord Cranworth's Act* relating to implied powers of sale were repealed by the *Conveyancing and Law of Property Act, 1881* (*g*), but not so as to affect mortgages made prior to 1882. The last mentioned act (*h*) gives to every mortgagee whose mortgage is made by deed a power somewhat similar to the power given in Ontario by the *Act respecting Mortgages of Real Estate* (*i*), except in so far as a contrary intention is expressed in the mortgage deed.

Implied
powers of
sale under
English Acts.

(*f*) 23 & 24 Vict. Imp. (1860) c. 145, ss. 11 *et seq.*

(*g*) 44 & 45 Vict. Imp. (1881) c. 41.

(*h*) s. 19.

(*i*) R.S.O. (1897) c. 121, s. 19.

Implied
power of
sale.

The Act respecting Mortgages of Real Estate (j) enacts
as follows:—

18. Where any principal money is secured or charged by deed executed after the 11th day of March, 1879, on any hereditaments of any tenure, or on any interest therein, the person to whom the money shall, for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of four months from the time when the principal money shall have become payable, according to the terms of the deed, or after any interest on the principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:

1st. A power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

These provisions do not apply to a mortgage deed which contains an express power of sale except in the two cases with which section 29 deals:—(1) Where a mortgage is made in pursuance of the short forms act and contains a power of sale which is in conformity with that act, the person exercising the power of sale may take the proceedings provided by this act instead of those prescribed by the short forms act. (2) Where a mortgage made in pursuance of the short forms act contains a power of sale which departs from that act by making the power of sale exercisable without notice, the mortgagee, his heirs, executors, administrators or assigns may in the same manner sell under and have the benefit of the provisions of this act.

Sale under
power in
void mort-
gage.

In a mortgage which was intended to be taken in the name of the mortgagee Mary Jane Burton, she, by mistake, was described as Clara Benton, that being a name she had never assumed or been known by. It was held that the legal estate did not pass to her by the mortgage, whatever its operation in equity; and that she could not make a good legal title to a purchaser under the power of sale in the mortgage (k).

(j) R.S.O. (1897) c. 121.

(k) *Burton v. Dougall* (1899) 30 Ont. 543.

iv. *Exercise of Power of Sale.*

A power of sale may provide for its exercise without notice; and such a power is as valid as one which requires notice to be given (*l*). But it is deemed oppressive that a mortgagee should have a power to sell without notice to the mortgagor (*m*); and it is therefore usual and advisable that notice should be given to the persons interested of the intention to exercise the power.

Formerly the power in the short forms act was reserved to the mortgagee, his heirs or assigns (*n*), but it is now reserved to the mortgagee, his heirs, executors, administrators or assigns (*o*). This change was properly made as the personal representatives of the mortgagee are the proper persons to receive the money and to assign or discharge the mortgage debt (*p*).

The exercise of a power of sale is not merely ministerial, but involves personal discretion on the part of the mortgagee, as for instance in fixing the time and place of sale, settling conditions of sale, advertising and in other matters connected with the sale. It would seem, however, that a power of sale, whether expressed in the mortgage deed or implied by statute, may be exercised by an agent of the mortgagee acting under power of attorney. For the power of sale is given to the mortgagee for his own benefit and he is not a trustee for the mortgagor; and a person having an absolute power may exercise it by attorney (*q*). In order that an agent of the mortgagee may convey the

Notice of intention to exercise power of sale.

Power now reserved to the mortgagee, his executors, administrators or assigns.

Attorney of mortgagee may exercise power.

(*l*) *Re British Canadian Loan and Investment Company and Ray* (1888) 16 Ont. 15.

(*m*) *Miller v. Cook* (1870) L.R. 10 Eq. 641; *Re Gilchrist and Island* (1886) 11 Ont. 537.

(*n*) See R.S.O. (1877) c. 104, Schedule B, clause 14.

(*o*) R.S.O. (1887) c. 107, Schedule B, clause 14; R.S.O. (1897) c. 126, Schedule B, clause 14.

(*p*) R.S.O. (1897) c. 121, s. 11.

(*q*) *Combes' Case* (1614) 9 Rep. 75.

lands to a purchaser it is necessary that the power of attorney should be under seal (*r*).

The legal representatives of an "assign" are "assigns."

Where the power of sale was, in a mortgage in fee, reserved to the mortgagee, his heirs, executors, administrators or assigns, and the mortgage was assigned, and the legal estate conveyed by the heir of the assignee to a trustee in trust for the administrator of the assignee, it was held that the administrator could exercise the power of sale (*s*).

New trustee not an assign.

Where a mortgage, made to trustees of a marriage settlement, contained a power of sale which was not in conformity with the short forms act, and the mortgage was on the resignation of the trustees assigned to a new trustee appointed in their place, it was held that the new trustee stood in the place of the former trustees and could exercise the power of sale, not as assignee of the estate, but as if appointed a trustee by the deed creating the trust (*t*).

Survivor of joint mortgagees may exercise power of all.

Where after 1st July, 1886, a mortgage is made to more persons than one jointly and not in shares, the mortgage money shall be deemed to be money belonging to the mortgagees on a joint account, unless a contrary intention is expressed in the mortgage (*u*); and the survivor or survivors of the mortgagees may exercise the power of sale.

Prior to 1st July, 1886, the survivor could not exercise the power of sale unless the mortgage contained an express declaration that the loan was made out of moneys belonging to the mortgagees on a joint account (*v*).

Where parts of moneys advanced belong to mortgagees severally all must concur.

Where a mortgage is made to several mortgagees to secure distinct sums advanced by them, it would seem that all the surviving mortgagees and the legal representatives of any deceased mortgagees must concur in exercising the

(*r*) *Hesse v. Briant* (1856) 2 Jur. N.S. 922.

(*s*) *Saloway v. Strawbridge* (1855) 1 K. & J. 371; 7 DeG. M. & G. 594.

(*t*) *Re Gilmour and White* (1887) 14 Ont. 694.

(*u*) R.S.O. (1897) c. 121, s. 13.

(*v*) *Hind v. Poole* (1855) 1 K. & J. 383.

power of sale, unless the mortgage deed contains a provision that the power of sale may be exercised by some one or more of the mortgagees (*w*).

Where the first and second mortgagees have powers of sale both may concur in selling (*x*).

By section 26 of the *Act Respecting Mortgages of Real Estate* (*y*) the person exercising the power of sale thereby conferred is empowered to convey the property to a purchaser "for all the estate and interest therein which the person who created the charge had power to dispose of." An equitable mortgagee selling under this act can convey the legal estate vested in the mortgagor (*z*). It is otherwise in England. Section 21 of the *Conveyancing and Law of Property Act, 1881*, (44 and 45 Vict. Imp. chapter 41) empowers the mortgagee to convey the property only "for such estate and interest therein as is the subject of the mortgage;" and it has been held that an equitable mortgagee selling under the last mentioned act cannot convey the legal estate (*a*).

Where an equitable mortgage is created by deed of *or reversion on lease.*
households by way of sub-lease the mortgagee may sell the whole of the original term (*b*).

The question has been raised whether a transfer of a mortgage by way of sub-mortgage has the effect of transferring the power of sale, or of destroying or suspending it (*c*). It would seem that by virtue of the *Act respecting Mortgages of Real Estate* (*d*), the power of sale contained in the original mortgage passes to and is exercisable by a

Equitable
mortgagee
with implied
power of sale
may convey
legal estate;

(*w*) See Robbins on Mortgages 890.

(*x*) *McCarogher v. Whieldon* (1864) 34 Beav. 107; *In re Cooper and Allen's Contract* (1876) 4 Ch. D. 802.

(*y*) R.S.O. (1897) c. 121.

(*z*) *Re Solomon and Meagher's Contract* (1889) 40 Ch. D. 508.

(*a*) *Re Hodson and Howe's Contract* (1887) 35 Ch. D. 668, C.A.

(*b*) *Hiatt v. Hillman* (1871) 19 W.R. 694.

(*c*) *Cruse v. Nowell* (1856) 2 Jur. N.S. 536.

(*d*) R.S.O. (1897) c. 121.

sub-mortgagee, even although not expressly transferred. For property is defined by the act to be "any debt, and anything in action and any other right or interest" (e). Thus the property comprised in the sub-mortgage consists of the original mortgage debt together with the rights incident thereto including the right of enforcing payment by exercise of the power of sale. Further the act provides that the power shall be exercisable by "the person to whom the money shall, for the time being, be payable," and that person is the sub-mortgagee so long as his security continues. So that if the sub-mortgagor makes default the sub-mortgagee may sell under the implied power of sale in the sub-mortgage and thus extinguish the sub-mortgagor's equity of redemption. And if the original mortgagor makes default the sub-mortgagee may exercise the power of sale, whether expressed or implied, in the original mortgage, and so extinguish the original mortgagor's equity of redemption.

Where mortgagor is a lunatic his committee may sell.

Where a mortgagee is a lunatic it would seem that the provisions of the *Act respecting Lunatics* are sufficiently wide to authorize an application by the committee to the court for leave to sell under the power of sale (f). Sections 14 and 15 of the act are as follows:—

14. Where a lunatic is seized or possessed of real estate, by way of mortgage, or as a trustee for others in any manner, the committee may apply to the Court for authority to convey such real estate to the person entitled thereto, in such manner as the Court may direct; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate; and the Court, upon hearing all the parties interested, may order a conveyance to be made; and on the application of any person entitled to a conveyance, the committee may be compelled by the Court, after hearing all parties interested, to execute a conveyance.

15. Every conveyance, mortgage, lease and assurance made by the committee under direction of the Court, pursuant to any of the provisions of this Act, shall be as valid as if executed by the lunatic when of sound mind.

(e) s. 1.

(f) R.S.O. (1897) c. 65.

By Section 23 of the *Real Property Limitation Act* Statute of Limitations, it is provided as follows (g):—

23. No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent; and in such case no action or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given.

In *Trust and Loan Company v. Stevenson* (h), it was pointed out that this section does not apply to an action for foreclosure, which is an action for the recovery of land and not for the recovery of money charged upon land. The section enacts that "no action or *other proceeding* shall be brought", and it appears clear that its provisions extend not only to an action for sale of the mortgaged lands but also to proceedings under the power of sale. It has been held that taking steps to sell under a writ of execution against lands is a proceeding to recover money charged upon land within the meaning of the section (i).

Where the power of sale was in these words:—
 "Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the lands without notice," and a covenant followed:—"And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors," it was held in an action by the mortgagor to set aside the sale that the mortgagees were not bound to wait until default had been made for three months before serving the notice, in other

Notice of
sale may be
concurrent
with default.

(g) R.S.O. (1897) c. 133.

(h) (1892) 20 Ont. App. 36.

(i) *Neil v. Almond* (1897) 29 Ont. 63.

words, that the month's notice and the three months' default might be concurrent (j).

Mortgagee
may agree to
sell before
power is
exercisable.

And it has been held that the mortgagee may enter into an agreement for sale before the power of sale is exercisable, if it is not to be carried into execution until the power becomes exercisable (k).

Notice where
power is
implied
may be
concurrent
with default.

Where the notice is served under the *Act respecting Mortgages of Real Estate* it may be given at any time after default in payment (l).

Form of
notice.

If the mortgagee is required to give notice before exercising the power of sale, but the length of notice is not specified, it would seem that reasonable notice must be given; and reasonable notice would be such as to give the mortgagor sufficient time to find the money (m). And if the manner of giving notice is not prescribed the mortgagee may exercise a reasonable discretion in giving notice by public advertisement instead of serving notice personally.

Notice must
be given to
persons
specified in
power.

The intention to sell should be distinctly stated in the notice. Where the notice stated only that unless payment should be made proceedings would be instituted to obtain possession, it was held that the notice was insufficient to support a sale (n).

The mode of giving notice prescribed by the power of sale should be strictly observed. In a case where the

(j) *Grant v. Canada Life Assce. Co.* (1881) 29 Gr. 256. See *contra Gibbons v. McDougall* (1879) 26 Gr. 214: the power of sale provided that after default of payment for one month and upon one month's notice of sale the mortgaged lands might be sold; and it was held that the month's default and the notice of sale could not run concurrently.

(k) *Farrar v. Farrars, Limited* (1888) 40 Ch. D. 395; *Major v. Ward* (1847) 5 Hare 598.

(l) R.S.O. (1897) c. 121, s. 20 (1).

(m) See *Moore v. Shelley* (1883) 8 App. Cas. 285, at p. 293.

(n) *Bartlett v. Jull* (1880) 28 Gr. 140.

power required that notice should be given to the mortgagor, his heirs, executors or administrators, and notice was served upon the widow and administratrix of the mortgagor, addressed to her as widow, and not upon the heir, a child three years of age, it was held that the notice of sale should have been served upon both the heir and the administratrix, the disjunctive conjunction referring only to the personal representatives and not to them and the heirs (o).

In *Bartlett v. Jull* (p) Spragge, C. said :—

"I find no case in which it has been held, or in which it has been contended, that where, by the terms of a contract, notice is required to be given, notice will be dispensed with because the person to whom it is to be given is not of capacity to understand it. . . . It does not follow from the heir in this case being so young, that the placing of a proper notice in his hands directed to him as heir-at-law would necessarily have been an idle form. It might have drawn the attention of the child's mother, who was, I apprehend, his guardian in socage, to his rights and to her duties in that relation; but whether practically useful or not it was a something without the doing of which the mortgagee had not the power to sell."

The power of sale in the short forms act provides for sale after giving notice to the "mortgagor, his heirs or assigns" (q).

Notice under
short forms
act.

Where the wife of the mortgagor joins in the mortgage for the purpose of barring her dower she has such an interest in the proceeds of the sale as to entitle her to notice of intention to sell (r).

Where a married woman makes a mortgage in which her husband joins, and the mortgaged lands are such that the husband is entitled to be tenant thereof by the courtesy, he is entitled to redeem, and notice of sale should be given him.

Husband of
mortgagor.

The *Devolution of Estates Act* (s) provides that where the real estate of a deceased person vests in the personal

Personal
representa-
tives, heirs
and devisees
of mortga-
gor.

(o) *Bartlett v. Jull* (1880) 28 Gr. 140.

(p) (1880) 28 Gr. 140.

(q) R.S.O. (1897) c. 126, Schedule B, clause 14.

(r) See *Dower Act*, R.S.O. (1897) c. 164, ss. 7, 8.

(s) R.S.O. (1897) c. 127.

representatives under the act, such personal representatives, while the real estate remains in them, shall be deemed to be the *heirs* (*t*). And if the power of sale is exercised while the real estate remains so vested in the personal representatives, notice of sale must be given to them.

*Devolution
of Estates
Act.*

The real estate remains vested in the personal representatives for twelve months after the death of the testator or intestate, or if a caution or cautions be registered, then for twelve months from the registration of such caution or the last of such cautions. After the expiration of that time the real estate will become vested in the heirs or devisees of the mortgagor beneficially entitled thereto or their assigns (*u*). And as the estate may shift under the act from the personal representatives to the beneficiaries the latter may have such an interest in the mortgaged lands as will entitle them to redeem. Therefore, if the power of sale is exercised while the real estate is vested in the personal representatives, it would seem to be necessary, or at least advisable, that the notice should be served in case of intestacy of the mortgagor upon both the heirs and the administrator, and in the case of a devise upon both the testator and the devisee (*v*).

Section 24 of the Manitoba *Devolution of Estates Act* provides as follows:—

24. When, by or under any indenture of mortgage, whether under the new or the old system as defined by "The Real Property Act," and whether heretofore or hereafter made, any notice is stipulated to be given to the mortgagor, his heirs or assigns, such notice may be given, in cases where such mortgagor or his assign is dead, to the executor or administrator of such deceased person; and such notice shall be as effectual as if made in conformity with such stipulation (*w*).

Where no personal representative.

A sale under a power requiring notice to be given will not be valid if there is no person in existence to whom notice can be given: if, therefore, the terms of the power

(*t*) s. 10.

(*u*) s. 13.

(*v*) See Armour on Titles, 2nd ed. 362.

(*w*) R.S. Man. (1891) c. 45.

require that notice shall be served upon the personal representative of the mortgagor, the power will not be exercisable until one is appointed (*x*).

The purchaser of the equity of redemption is entitled to notice. And where the equity of redemption has been sold in several parcels to different persons who are entitled to redeem in respect of their own parcels, these different persons are entitled to notice (*y*).

Purchaser
of equity of
redemption.

If the power requires notice to be given to the mortgagor or his assigns, and there is a second mortgage made by the mortgagor, it is not sufficient to give notice to the mortgagor alone, but the second mortgagee also is entitled to notice, and may recover damages from the first mortgagee if he exercises the power of sale without giving such notice. The words are to be read as meaning "the mortgagor and his assigns" (*z*).

Subsequent
mortgagee
entitled
to notice as
an assign.

In *Stewart v. Rowsom* (*a*) the plaintiff had entered into an agreement in writing with the second mortgagee and the mortgagor whereby he was entitled to enforce a transfer of all their interest to him. The first mortgagee, with express notice of this agreement, made a sale under the power in his mortgage, without giving notice to the plaintiff. It was held that the plaintiff was entitled to notice and the sale was set aside.

Persons
having
interests in
the land of
which mort-
gagee has
express
notice en-
titled to be
notified.

If the owner of lands makes a lease and subsequently mortgages the lands the mortgagee is in the position of assignee of the reversion on the lease and takes the lands subject to the lease. But if the mortgagor after making the mortgage leases the lands, the lessee is a purchaser of the equity of redemption *pro tanto* and is

Lessee of
mortgagor.

(*x*) *Parkinson v. Hanbury* (1860) 1 Dr. & Sm. 143; 2 DeG. J. & S. 152; L.R. 2 H.L. 1.

(*y*) *Buckley v. Wilson* (1861) 8 Gr. 566.

(*z*) *Hoole v. Smith* (1881) 17 Ch. D. 434.

(*a*) (1892) 22 Ont. 533.

entitled to redeem. He is therefore entitled to notice of sale (b).

Execution creditors of mortgagor.

Execution creditors of the mortgagor, whose writs are in the sheriff's hands at the time of giving notice of sale to the mortgagor, are assigns and as such are entitled to notice (c).

Execution creditors of mortgagee.

Execution creditors of the mortgagee are not entitled to notice of sale (d). They have, however, such an interest in the due exercise of the power that the court will grant them relief against a mortgagee exercising the power to their disadvantage (e).

Principal and surety.

Where mortgagees sold the mortgaged premises without notice to a person who was surety for part of the debt, it was held that they were liable as between themselves and the surety for the full value of the property (f).

If the person to be served is a lunatic service upon him is nevertheless valid; it is unnecessary to provide that the notice shall be valid in such case (g).

Notice to lunatic.

And where the terms of the power of sale require the notice to be served upon the heir, and he is an infant, service upon him is valid and sufficient (h).

Cestui que trust should be notified.

If a trustee has not sufficient funds in his hands to enable him to redeem he will not properly represent his *cestui que trust*. In that case the *cestui que trust* should be served with notice for he is, of course, interested in the equity of redemption and may be in a position to redeem (i).

(b) *Tarn v. Turner* (1888) 39 Ch. D. 456; see *Anderson v. Stevenson* (1888) 15 Ont. 563; *Martin v. Miles* (1883) 5 Ont. 404; *Collins v. Cunningham, Cunningham v. Drysdale* (1892) 21 S.C.R. 139 at p. 149.

(c) *Re Abbott and Medcalf* (1891) 20 Ont. 299.

(d) But see *Sanderson v. Ince* (1859) 7 Gr. 383.

(e) *Commercial Bank v. Watson* (1859) 5 U.C.L.J. 163.

(f) *Martin v. Hall* (1878) 25 Gr. 471.

(g) *Tracy v. Lawrence* (1854) 2 Dr. 403. A notice of dissolution of partnership properly given under the articles is good, though the partner served be insane: *Robertson v. Lockie* (1846) 15 Sim. 285.

(h) *Bartlett v. Jull* (1880) 28 Gr. 140.

(i) See *Goldsmid v. Stonehewer* (1852) 9 Hare App. XXXVIII; *Mills v. Jennings* (1880) 13 Ch. D. 639, C.A.

Notice need be given only to the mortgagor or those claiming under him. If there is a mortgage paramount to the mortgage under which the power of sale is being exercised it is not necessary to notify the paramount mortgagee, but the sale will be subject to his claim.

Notice need
not be given
to paramount
mortgagee.

And where a mortgagor took lands by a conveyance which was void as against creditors, and then conveyed to the mortgagee without notice, and the conveyance to the mortgagor was subsequently set aside as against creditors, it was held that the mortgagee need not give notice to the creditors of the mortgagor, the mortgage being paramount to their title, even although the creditors might have a right to redeem and to require an account of the proceeds of the sale (j).

The mortgagor or his assigns may waive the right to notice. Such waiver may be either express or implied from conduct; but mere delay or inaction is not waiver (k). A mortgagor cannot waive notice as against an assignee from him of the equity of redemption (l).

Waiver of
notice.

Where the power of sale provided that notice should be given to the mortgagor, his heirs, executors, administrators or assigns, or left at his or their usual or last known place of abode, and the notice was affixed to the door of the last known place of abode, this was held to be valid service as against the creditors of the mortgagor (m).

Mode of
service of
notice.

By the terms of the power of sale in the *Act respecting Short Forms of Mortgages* (n) notice of sale is required to be given to the mortgagor, his heirs or assigns, either personally or at his or their usual or last place of residence

Service
under short
forms act.

(j) *Major v. Ward* (1847) 5 Hare 598.

(k) *Selwyn v. Garfit* (1888) 38 Ch. D. 273; *In re Thompson and Holt* (1890) 44 Ch. D. 492.

(l) *Forster v. Hoggart* (1850) 15 Q.B. 155; *Selwyn v. Garfit* (1888) 38 Ch. D. 273.

(m) *Major v. Ward* (1847) 5 Hare 598.

(n) R.S.O. (1897) c. 126, Schedule B (14.)

within the Province. The Divisional Court, reversing the judgment of Proudfoot, J., held that the statute permits substitutional service at the usual or last place of residence of the mortgagor although he may be within the Province (*o*).

Three modes of service are permitted by the statute:—
 (1) personal service on the mortgagor; (2) service by leaving a copy of the notice with a grown-up inmate at the mortgagor's usual place of residence within the Province; and (3) service by leaving the notice at the mortgagor's last place of residence within the Province (*p*).

A difficulty may arise where personal service cannot be effected and the mortgagor has no usual place of residence within the Province, and where further the mortgagor's last place of residence within the Province is not known. To meet this difficulty a clause similar to the following is frequently inserted in the mortgage deed immediately after the clause giving the power of sale:—

“Provided that the hereinbefore mentioned notice of exercise of power of sale may be effectually given either by leaving the same with a grown-up person on the mortgaged premises, if occupied, or by placing the same on some portion thereof, if unoccupied, or at the option of the said mortgagee by publishing the same twice (*or as the case may be*) in some newspaper published in the county in which the said lands are situate, and that such notice shall be sufficient though not addressed to any person or persons by name or designation, and notwithstanding any person or persons to be affected thereby may be unknown, unascertained, or under disability.”

Service
under *Act*
respecting
Mortgages of
Real Estate.

Where the power of sale arises under the *Act respecting*

(*o*) *O'Donohoe v. Whitty* (1882) 2 Ont. 424, referring to *Major v. Ward* (1847) 5 Hare 598; affirmed in Court of Appeal but on sole ground that the solicitors had not been negligent in regard to the service of the notice; 20 C.L.J. 146.

(*p*) Per Boyd, C. *O'Donohoe v. Whitty* (1882) 2 Ont. 424.

ing Mortgages of Real Estate (q) the service is regulated as follows :—

20. (1) No sale as aforesaid shall be made until after two months' notice in writing has been given to any subsequent incumbrancer, and to the person entitled to the property subject to the charge and to such incumbrance, the notice to be given either personally or at his usual or last place of residence in this Province, which notice may be given at any time after any default in making a payment provided for by the deed.

(2) In case of the death of the person entitled subject to the charge, and of his interest therein passing to infant heirs or devisees, the notice shall be given as aforesaid to his executors or administrators, as well as to his heirs or devisees, as the case may be.

(3) The notice for an infant heir is to be served upon his guardian, and is also to be served upon the infant himself, if over the age of twelve years.

A notice of sale of lands under the provisions of the *Act respecting Mortgages of Real Estate (r)* and every notice of exercising the power of sale contained in any mortgage may be registered in the Registry Office of the Registry Division in which the lands are situate. The affidavit for the purpose of registering the notice shall be made by the person who served the same, and shall prove the time, place and manner of such service, and that the copy delivered to the registrar is a true copy of the notice served. A copy of such registered notice and affidavit, certified under the hand and seal of the registrar, shall in all cases be received as *prima facie* evidence of the facts therein stated (s).

Where the mortgagee on default of payment of an instalment gives notice to the mortgagor, requiring him to pay off the whole mortgage debt, he cannot subsequently withdraw the notice without the consent of the mortgagor (t).

Registration
of notice of
exercising
power of
sale.

Mortgagee
cannot with-
draw notice
to pay off.

(q) R.S.O. (1897) c. 121.

(r) R.S.O. (1897) c. 121.

(s) R.S.O. (1897) c. 121, ss. 23, 24; c. 136, s. 72.

(t) *Santley v. Wilde* [1899] 1 Ch. 747; reversed [1899] W.N. 132, C.A.

vi. *Concurrent Proceedings by Mortgagee.*

Suspension
of remedies
when
demand of
payment is
made or
notice of
intention to
exercise
power of
sale is given.

By sections 31 and 32 of the *Act respecting Mortgages of Real Estate* (*u*), it is enacted as follows:—

31. (1) In order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings and no action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or the lands or any part thereof thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court.

(2) Such order may be obtained *ex parte*, but only upon such affidavits and proof as will satisfy the Judge that it is reasonable and equitable that the proposed action or proceeding should be allowed to be taken and proceeded with.

(3) Such affidavit or order may be entitled as follows:

In the matter of a mortgage purporting to be made between
(describing the parties thereto as in the mortgage) and bearing date
on the — day of

(4) This section shall not apply to proceedings to stay waste or other injury to the mortgaged premises, and the costs of any application thereunder shall be in the discretion of the Judge.

32. When such demand or notice requires payment of all moneys secured to be paid by or under a mortgage, the party making such demand or giving such notice shall accept and receive payment of the same if made as required by the terms of such notice or demand; and if there be any dispute as to the costs payable by the person by or on whose behalf such payment is either made or tendered then such costs shall, on three clear days' notice to such person by the person claiming the same, be taxed and ascertained by the clerk of a County Court, or by a local master aforesaid, and thereupon and in such case, if within ten days after said costs have been so taxed and ascertained, payment of said moneys and costs are duly made or tendered to the person entitled thereto, or to his solicitor or agent in that behalf, the same shall be deemed and taken to have been paid or tendered, as the case may be, within the meaning of such notice or demand and in compliance therewith.

Right of
mortgagee
prior to act.

Prior to this enactment the mortgagee had the right to institute proceedings under the power of sale and con-

(*u*) R.S.O. (1897) c. 121.

currently therewith to bring action to recover the mortgage debt under the covenant, or to recover possession of the lands.

Where the notice of sale under a power of sale was dated 2nd May and a writ claiming payment under the covenant was issued on 3rd May, and both notice and writ were served on 3rd May, it was held that the issue of the writ was a further proceeding within the meaning of the act, and an order was made setting aside the service of the writ and staying all proceedings in the action (v).

In *Lyon v. Ryerson* (w), the action was commenced to enforce payment under the covenant. After the issue of the writ the mortgagee served notice of exercising the power of sale unless the mortgage moneys should be paid within thirty days, but subsequently the mortgagee gave notice of abandonment of the notice of sale. It was held that the mortgagee was bound by the notice, and the proceedings in the action were stayed for the thirty days named therein.

An advertisement for sale is a proceeding within the meaning of the words "no further proceedings;" and where a mortgagee served a notice stating that unless payment should be made within a month from service the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing an advertisement of sale until after the expiration of the month (x).

Proceedings will be stayed only where "pursuant to any condition or proviso contained in the mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under

Notice of sale and writ of summons served concurrently.

Mortgagee cannot abandon notice of sale served by him.

Advertisement is a proceeding within the act.

Act does not apply where power of sale is exercisable without notice.

(v) *Perry v. Perry* (1884) 10 P.R. 275.

(w) (1897) 17 P.R. 516; see *Santley v. Wilde* [1899] 1 Ch. 747; reversed [1899] W.N., C.A. 132.

(x) *Smith v. Brown* (1890) 20 Ont. 165. The original Act 47 Vict. (1884) (Ont.) c. 16, s. 1 provided that no further proceedings *at law or in equity* should be taken. The words in italics were omitted from R.S.O. (1887) c. 102, s. 30.

and exercise the power of sale"; and the act does not apply where the power of sale is exercisable without any notice (*y*).

vii. *Conduct of Sale.*

Mortgagee
not a trustee
for
mortgagor.

A mortgagee exercising a power of sale is not a trustee for the mortgagor except as regards the surplus of the purchase money arising from the sale after the mortgage debt is satisfied. This is so whether the mortgage is in the ordinary form or by way of trust for sale (*z*).

In *Matthie v. Edwards* (*a*) it was said :—

"A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is as between them bound to exercise some discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances obtainable."

And in *Farrar v. Farrars, Limited* (*aa*) the court said :—

"A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed (*b*)."

In *Kennedy v. De Trafford* (*c*) *L.J.* said :—

"A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at

(*y*) *Canada Permanent Building Society v. Teeter* (1889) 19 Ont. 156.

(*z*) *Kirkwood v. Thompson* (1865) 2 H. & M. 392; *Locking v. Parker* (1872) 8 Ch. 30; *Re Alison, Johnson v. Mounsey* (1879) 11 Ch. D. 284.

(*a*) (1846) 2 Coll. 465; 10 Jur. 347; S.C. on appeal *sub. nom. Jones v. Matthie* 11 Jur. 504.

(*aa*) (1888) 40 Ch. D. 395 at p. 410.

(*b*) See also *Cholmondeley v. Clinton* (1820) 2 J. & W. 1 at p. 182; *Matthie v. Edwards* (1846) 2 Coll. 465; *Davey v. Durrant* (1857) 1 De G. & J. 535; *Warner v. Jacob* (1882) 20 Ch. D. 220.

(*c*) [1896] 1 Ch. 762 at p. 772, C.A.; affirmed [1897] A.C. 180.

liberty to look after his own interest alone, and it is not right, or proper, or legal for him, either fraudulently or wilfully, or recklessly, to sacrifice the property of the mortgagor; that is all.

But a sale under power of sale may be set aside if the conduct of the mortgagee is oppressive. This relief was granted in a case in which the mortgagee exercised the power after a tender of principal and interest (the costs not having been ascertained) and the purchaser was aware of the facts (d).

Oppressive use of power may invalidate sale.

A solicitor took from his client a mortgage for \$200 for costs, the mortgage being a valid security for about \$30 only, as not more than that amount of costs had been incurred at the time of taking the mortgage. The purchaser under the power of sale in the mortgage became aware before completing the purchase of the vexatious and oppressive user of the power. It was held under these circumstances that the purchaser could not acquire a good title to the lands and further that he was entitled to recover back the deposit paid by him (e).

The extended form of power of sale in the short forms act (f) provides that the person exercising the power may sell "by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet." And a sale under the power of sale conferred by the *Act respecting Mortgages of Real Estate* (g) may be "by public auction or private contract."

Sale by public auction or private contract.

In *Davey v. Durrant* (h) Turner, L.J. in dealing with a power similar in terms said:—

"To hold that the mortgagee was bound in the first instance to put up the property for sale by auction would be to limit, cut down the power given by the deed, which expressly authorizes a sale

(d) *Jenkins v. Jones* (1860) 2 Giff. 99.

(e) *Locking v. Halsted* (1888) 16 Ont. 32.

(f) R.S.O. (1897) c. 126, Schedule B (14).

(g) R.S.O. (1897) c. 121, s. 18.

(h) (1857) 1 DeG. & J. 535. In *Re Shore* (1890) 6 Man. R. 305 the mortgage contained a power of sale which permitted sale by public auction or private contract; it was held that a sale could be made without previous advertisement.

Mortgagee must exercise power bona fide. by public auction or private contract; and certainly I am not prepared to hold that a mortgagee is not justified in accepting a fair offer for the purchase of the mortgaged property until he has advertised the property for sale."

Terms of power must be observed.

Advertisement of sale.

But it is the duty of the mortgagee to exercise the power of sale *bona fide*. He must not sacrifice the property, but on the contrary must take reasonable precautions to obtain a proper price (*i*).

Where the terms of the power prescribe that the sale shall be by public auction only, a sale by private contract will not be valid (*j*).

It would be inadvisable for the mortgagee to depart from the well established practice of duly advertising the property for sale; the advertisement is an evidence of the mortgagee's good faith and desire to obtain the best possible price.

Where the mortgagee offered the property for sale without advertisement and sold it for one half its cash value, the price received being near the amount due to himself, the sale was set aside (*k*).

In *Richmond v. Evans* (*l*) Spragge, V.-C. said:—

"It is the ordinary course before a sale by auction to give every publicity to it by advertisement in the newspapers and by handbills; I should almost have said it is the invariable practice. I think the sale in question is the only exception that has ever come under my notice. It is the course of this court and the practice of everyone who desires to get the best price that can be gotten for the property to be sold."

Where the mortgagees selling under power of sale inserted no advertisement in a local newspaper but only in a newspaper published in a town over seventy miles distant, and the advertisement made no mention of any

(*i*) *Farrar v. Farrars, Limited* (1888) 40 Ch. D. 395; *Kennedy v. De Trafford* [1896] 1 Ch. 762, C.A.; affirmed [1897] A.C. 180; *Chatfield v. Cunningham* (1892) 23 Ont. 153.

(*j*) *Bousfield v. Hodges* (1863) 33 Beav. 90.

(*k*) *Latch v. Furlong* (1866) 12 Gr. 303; see *Richmond v. Evans* (1861) 8 Gr. 508; *Thompson v. Holman* (1880) 28 Gr. 35; *Aldrich v. Canada Permanent Loan and Savings Co.* (1896) 27 Ont. 548; affirmed 24 Ont. App. 193.

(*l*) (1861) 8 Gr. 508.

improvements, although there were valuable improvements on the land, it was held that the mortgagees had so negligently and carelessly conducted the sale that the property was sacrificed, and that they were liable for the difference between the amount realized by the sale and the amount which the evidence shewed the property would have brought if it had been properly advertised (m).

The usual practice is to advertise the sale once a week *Practice.* for three or four consecutive weeks and to fix as the date for sale a day one or two weeks after the last publication of the advertisement. In some cases it will be advisable to advertise in a newspaper published in the neighbourhood of the property to be sold: in other cases, as for instance where the property is a manufactory, the advertisement might be published to more advantage in one of the newspapers of the largest city in the Province. It is usual to post up or distribute about one hundred posters; but it would seem that even fifty will be sufficient (o).

The extended form of the power of sale in the short forms act (p) provides that the person exercising the power of sale "may sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, or *any part or parts thereof*, with the appurtenances." And the implied power of sale given by the *Act respecting Mortgages of Real Estate* (q) provides for the sale of *the whole or any part* of the property.

Such a power of sale does not authorize the sale of timber standing upon the mortgaged lands without the

Mortgagee
may sell
part of the
mortgaged
lands.

May not sell
timber
without
land;

(m) *Carruthers v. Hamilton Provident and Loan Society* (1898) 12 Man. R. 60, following *Aldrich v. Canada Permanent Loan and Savings Company* (1896) 27 Ont. 548; affirmed 24 Ont. App. 193; and *National Bank of Australasia v. United Hand-in-Hand etc. Co.* (1879) 4 App. Cas. 391.

(n) *Thompson v. Holman* (1880) 28 Gr. 35.

(p) R.S.O. (1897) c. 126, Schedule B (14).

(q) R.S.O. (1897) c. 121, s. 18.

land (*r*). But where the security is scanty the mortgagee may cut the timber subject to an account at the proper time (*s*).

In *Cholmeley v. Paxton* (*t*) Best, C. J. said:—

"They (the trustees) might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell *part* of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows."

nor trade
machinery.

Nor may the mortgagee exercising his power of sale sell trade machinery apart from the mortgaged buildings (*u*).

The principle may be stated thus:—The land may be divided vertically and parcels of it sold; but it may not be divided horizontally (*v*).

Duty of
mortgagee
to sell in
parcels.

The mortgagee is bound to take proper precautions to ensure an advantageous sale; and if the circumstances so require he must sell the property in parcels and not in a block. The mortgagees in a mortgage containing two parcels of land, a farm with buildings, and some village lots with stores thereon about three-quarters of a mile distant from the farm, sold the property *en bloc*, under the power of sale in the mortgage, for a much smaller sum, as shown by the evidence, than would have been realized had the properties been sold separately; and it was held that the mortgagees had not acted with due prudence and discretion, and that they were liable to the mortgagors for the amount that might have been realized (*w*).

Liability
of mortgagee

A mortgagee is chargeable with the full value of the

(*r*) *Stewart v. Rowsom* (1892) 22 Ont. 533.

(*s*) *Brethour v. Brooke* (1893) 23 Ont. 658; affirmed 21 Ont. App. 144.

(*t*) (1825) 3 Bing. 207 at p. 213.

(*u*) *In re Yates, Batchelder v. Yates* (1888) 38 Ch. D. 112. See *Ex parte Barclay, In re Joyee* (1874) 9 Ch. 576; *Ex parte Brown, In re Reed* (1878) 9 Ch. D. 389.

(*v*) *Stewart v. Rowsom* (1892) 22 Ont. 533.

(*w*) *Aldrich v. Canada Permanent Loan & Savings Co.* (1896) 27 Ont. 548; affirmed 24 Ont. App. 193.

mortgaged property sold, if from want of care and diligence it has been sold at an undervalue (x).

The power of sale in the short forms act (y) authorizes the mortgagee to "sell and absolutely dispose of" the mortgaged lands, and the mortgagee may exercise the power by way of exchange for other land instead of by sale for money (z).

Power to sell
authorizes
exchange for
other land.

A mortgagee selling under power of sale may make special conditions provided they are not unreasonably depreciatory.

In *Falkner v. Equitable Reversionary Society* (a) Kindersley, V.-C. said in reference to a condition that the vendor might rescind if unable or unwilling to answer objections to title :—

"This, however, must be borne in mind, that though of course the object of the mortgagor is to realize the largest amount that can be got, yet it does not follow that conditions of sale, the effect of which would be to obtain the largest possible amount at the sale, are always the best for the mortgagor; for they may be such that after selling at a good price immense expense may afterwards occur, and after all you may fail in enforcing the contract, which would be to the detriment of the mortgagor. It does not follow, therefore, that because the conditions do to some extent tend to depreciate the price that will be offered at the sale, they are conditions which are really to the detriment of the mortgagor. If such a condition as this were to the detriment of a mortgagor, it would be equally so when the absolute owner is selling; and yet we find that it is in practice a very ordinary and reasonable condition for an absolute owner to introduce in his conditions, and one that without saying all conveyancers, but at any rate many leading conveyancers, consider extremely proper to be introduced when a mortgagee is selling under a power. The strong impression upon my mind is this, that the question is not simply whether such a condition may tend to diminish the number of buyers or the sum which any bidder may be disposed to give; but whether it would tend to the detriment of the mortgagor or of an absolute owner, or be prudent in an absolute owner. If it would be prudent in an absolute owner it is not imprudent as affecting a mortgagor."

(x) *National Bank of Australasia v. United Hand-in-Hand etc. Co.* (1879) 4 App. Cas. 391. See *Rennie v. Block* (1896) 26 S.C.R. 356.

(y) R.S.O. (1897) c. 126, Schedule B (14).

(z) *Smith v. Spears* (1892) 22 Ont. 286. See *Abel v. Heathcote* (1793) 4 B.C.C. 277, where it was held that the word "sell" justifies partition; *In re Frith and Osborne* (1876) 3 Ch. D. 618, where it was held that a power of exchange authorizes partition; Watson's Comp. of Equity, 2nd Ed. Vol. II. 876.

(a) (1858) 4 Drew. 352.

What are reasonable conditions.

Where a condition of sale provided that the abstract should commence with a certain deed fifteen years old, that all recitals in deeds fifteen years old should be taken as conclusive evidence of the facts recited, and that the purchaser should not require evidence as to the identity of the parcels, it was held that the condition was proper (b). But a condition by trustees that the title should commence with the deed under which they took the trust property was held to be improper (c).

viii. *Mortgagee exercising Power of Sale may not purchase.*

Mortgagee cannot sell to himself.

A mortgagee with power of sale, except where in a judicial sale he obtains the leave of the court to bid, cannot sell to himself either alone or with others ; nor can he sell to a trustee for himself.

Sale by mortgagee to himself ineffectual.

In *Farrar v. Farrars, Limited* (cc) it was said :—

"A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction (d)."

A mortgagee sold the mortgaged premises under his power of sale ostensibly to a third person but in reality to himself. Shortly afterwards he sold a portion of the lands for a sum exceeding the amount due on the mortgage, and he also received rents from the remaining portion. It was held that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus received

(b) *Kershaw v. Kalow* (1855) 1 Jur. N.S. 974.

(c) *Dance v. Goldingham* (1873) 8 Ch. 902.

(cc) (1888) 40 Ch. D. 395 at p. 409.

(d) See *Downes v. Grazebrook* (1817) 3 Mer. 200; 17 R.R. 62; *Robertson v. Norris* (1858) 1 Giff. 421; *National Bank of Australasia v. United Hand-in-Hand etc. Co.*, (1879) 4 App. Cas. 391; *Re Bloye's Trust* (1849) 1 Mac. & G. 488; *Henderson v. Astwool* [1894] A.C. 150, P.C.

from the second sale and for the rents, together with interest on both amounts; and the mortgagee was ordered to pay the costs of the action (e).

Where the first mortgagee after making preliminary arrangements to ensure an advantageous sale of the mortgaged property bought the second mortgagee's security at a discount, without informing him of such arrangements, the court refused to set aside the sale (f).

Where a person has acted as agent for the mortgagee, for example, in negotiating the loan, receiving the interest for the mortgagee, or conducting the sale, he cannot purchase from the mortgagee under the power of sale (g).

The solicitor for a mortgagee cannot purchase even although the proceedings for sale were not taken in his name, and it was not shown that any loss had occurred by reason of his being the purchaser (h).

In *Nutt v. Easton* (i) the facts were as follows:—In 1887 the executrix of a mortgagee employed the defendant Easton, a solicitor, to obtain probate of the mortgagee's will, and shortly afterwards being anxious to realize the mortgage, she asked the defendant Easton to find a purchaser, when he reluctantly agreed that if he could not find a purchaser within a short time he would buy. No purchaser was found, and the executrix in the *bona fide* exercise of the power of sale contained in the mortgage sold and conveyed the mortgaged property to the defendant Easton for more than its actuarial value. The defendant Easton gave notice of his purchase to the plaintiff who had bought the equity of redemption, and who at once

First mortgagor about to sell may purchase second mortgage.

Agent of mortgagee may not purchase.

Nor may solicitor of mortgagee.

Bona fide sale to solicitor and acquiescence therein.

(e) *Mitchell v. Kinneear* (1897) (New Bruns.) 33 C.L.J. 547; *Ellis v. Dellabough* (1869) 15 Gr. 583.

(f) *Dolman v. Nokes* (1855) 22 Beav. 402.

(g) *Orme v. Wright* (1839) 3 Jur. 19; *Whitcomb v. Minchin* (1820) 5 Madd. 91; *In re Blaye's Trust* (1849) 1 Mae. & G. 488; *Lawrance v. Galsworthy* (1857) 3 Jur. N.S. 1049; *Martinson v. Cloves* (1882) 21 Ch. D. 857.

(h) *Howard v. Harding* (1871) 18 Gr. 181.

(i) [1899] 1 Ch. 873.

took legal advice as to his position and rights, but took no steps to set aside the transaction until ten years afterwards. It was held that the sale could not be set aside, as on the evidence the defendant Easton was not acting as solicitor for the executrix at the time of the sale to himself; and that, even if he did act as solicitor for the executrix in the matter of the sale, the plaintiff was barred by his laches and acquiescence.

**Mortgagee
may sell to
corporation
of which he is
shareholder.**

A *bona fide* sale by a mortgagee to a corporation of which he is a shareholder is not voidable by the mortgagor (*j*). But where the mortgagee sold under the power of sale to a company of which he was a promoter and also solicitor, the onus was thrown upon those supporting the sale of proving that the sale was *bona fide* and not at an undervalue (*k*).

**Subsequent
mortgagee
may
purchase.**

A subsequent incumbrancer, whether his mortgage is in the ordinary form or by way of trust for sale, may in the absence of fraud purchase from the first mortgagee, and the subsequent incumbrancer so purchasing will acquire as absolute a title to the lands as a stranger would (*l*).

In *Watkins v. McKellar* (*m*) it was said :—

"The proposition that the defendants, being mortgagees, were incapable of acquiring an absolute interest in the property in question, proceeds, I suppose, upon this, that a mortgagee is a trustee for the mortgagor, and incapable, therefore, of dealing with the estate for his own benefit. That a mortgagee is a trustee for his mortgagor in some sense of that word, cannot be denied; but that he is not a trustee in the sense implied in the argument, is equally clear. Had it been true that mortgagor and mortgagee stand to each other in the relation of trustee and *cestui que trust*, then all dealings between the mortgagor and mortgagee in relation to the equity of redemption must have been regulated by the rules applicable to dealings between trustee and *cestui que trust*; and upon the same assumption every purchase of an incumbrance affecting the estate made by the mortgagee must have been held to be a purchase for the benefit of the mortgagor. But the falsity of both conclusions is apparent. And if it be true, as I apprehend it is, that a mortgagee is

(*j*) *Farrar v. Farrars, Limited* (1888) 40 Ch. D. 395, C. A.

(*k*) *Farrar v. Farrars, Limited* (1888) 40 Ch. D. 395, C. A.

(*l*) *Parkinson v. Hanbury* (1867) L.R. 2 H.L. 1; 1 Dr. & Sm. 143; 2 DeG. J. & S. 450. See *Shaw v. Bunny* (1865) 2 DeG. J. & S. 468; *Kirkwood v. Thompson* (1865) 2 H. & M. 392; 2 DeG. J. & S. 613.

(*m*) (1859) 7 Gr. 584.

allowed to deal for the equity of redemption as a stranger; and if it be clear, as it no doubt is, that a mortgagee who gets in an incumbrance affecting the mortgage estate, is entitled to receive the full amount due upon such incumbrance, no matter how advantageous the terms upon which he may have acquired it, then I know of no principle upon which to hold a puisne incumbrancer incapacitated from purchasing the estate upon a sale by a prior mortgagee, under a power in his deed (n)."

And where a second mortgagee purchases under the power of sale contained in the first mortgage, he is notwithstanding such purchase entitled to collect, by virtue of the covenant contained in the second mortgage, the principal and interest due under the second mortgage (o).

If the mortgagor purchases from the mortgagee selling under the power of sale, this operates only as a redemption of the first mortgage and the mortgagor cannot set up the purchase against a second mortgage made by himself before the purchase. The purchase in such case inures to the benefit of the second mortgagee (p).

There is no fiduciary relation between co-mortgagors, tenants in common of the mortgaged lands, and one of the several co-mortgagors may purchase the lands from the mortgagee, if the exercise of the power of sale is *bona fide*, even although the price paid by the purchaser does not exceed the exact amount due for principal, interest and costs (q).

ix. Conveyance after Sale under Power.

On a sale of mortgaged lands it is usual to require the purchaser to make a deposit of ten per cent., that being the amount required on a judicial sale by the standing conditions of the court. But the mortgagee has power to fix what sum he chooses as being a reasonable deposit (r).

Second
mortgagee
purchasing
may enforce
payment of
his mortgage

Effect of
purchase by
mortgagor.

Co-mortga-
gor may
purchase.

Terms of
payment
deposit.

(n) See *Brown v. Woodhouse* (1868) 14 Gr. 682.

(o) *Harron v. Yemen* (1883) 3 Ont. 126.

(p) *Otter v. Lord Vaux* (1856) 2 K. & J. 650; 6 DeG. M. & G. 638; *Box v. Bridgman* (1875) 6 P.R. 234.

(q) *Kennedy v. De Trafford* [1896] 1 Ch. 762, C.A.; affirmed [1897] A.C. 180.

(r) *Farrer v. Lacy, Hartland & Co.* (1885) 31 Ch. D. 42.

Payment of deposit by cheque.

An agent of the mortgagee, selling under a power of sale is not negligent in accepting a cheque in payment of the deposit; and the mortgagee will not be deprived of the costs of a sale which is rendered abortive by such acceptance (s).

Effect of taking security for purchase money.

A mortgagee selling under a power of sale may give time for payment of part of the purchase money without the consent of the mortgagor, but he must account for the purchase money as cash at the time of the sale, and cannot charge the mortgagor with a discount paid for cashing the mortgage or with costs thereby incurred. Boyd, C. said:—

“The reason is that he can deal as he pleases about giving time on his own debt, and if as to any surplus he accounts forthwith to the mortgagor and pays him cash, that removes any objection on the part of the latter that the sale should have been a cash sale (t).”

Mortgagee under obligation to carry out sale.

Where a mortgagee has sold the lands under the power of sale he is under obligation to carry out the sale; he cannot without sufficient reason treat the sale as a nullity and fall back on the mortgage to enforce payment in other ways, as if the exercise of the power was a mere matter of form (u).

Determination of power of sale.

A mortgagee's power of sale is not extinguished by reason of an ineffectual attempt to exercise it (v).

Conveyance.

Where the mortgage is made in pursuance of the short forms act the mortgagee is empowered to sell and absolutely dispose of the mortgaged lands, and “to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint (w).”

(s) *Farrer v. Lacy, Hartland & Co.* (1885) 31 Ch. D. 42.

(t) *Beatty v. O'Connor* (1884) 5 Ont. 731; *Davey v. Durrant* (1857) 1 DeG. & J. 535; *Thurlow v. Mackeson* (1868) L.R. 4 Q.B. 97.

(u) *Patterson v. Tanner* (1892) 22 Ont. 364.

(v) *Henderson v. Astwood* [1894] A.C. 150.

(w) R.S.O. (1897) c. 126, Schedule B (14).

Section 26 of the *Act respecting Mortgages of Real Estate* (*x*) provides as follows :—

26. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of.

An equitable mortgagee selling under an implied statutory power can convey the legal estate vested in the mortgagor (*y*). And where an equitable mortgage is created by way of sub-lease the mortgagee may sell the nominal reversion (*z*).

A deed under power of sale should recite the power, the default and the intention to sell and notice thereof. But it is not essential that the deed should purport to be made in exercise of the power. There must be the intention to sell under the power or to pass the property subject to the power, but the intention may be collected from other circumstances, or may be presumed. And where after a decree and final order of foreclosure, which proved to be invalid, the mortgagees sold the lands, reciting in the deed the foreclosure proceedings but making no mention of the power of sale, it was held that this was a valid exercise of the power (*a*).

A deed in the usual statutory form with the usual covenants and without any recitals was held to have been made in exercise of the power of sale (*b*).

Equitable
mortgagee
with implied
power may
convey legal
estate ;
or reversion
on lease.

Deed with
erroneous
recital.

Deed without
recital.

(*x*) R.S.O. (1897) c. 121.

(*y*) *Re Solomon and Meagher's Contract* (1889) 40 Ch. D. 508. But not so in England in cases where the power is conferred by the *Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41); *Re Hodson and Howes' Contract* (1887) 35 Ch. D. 668, C.A.

(*z*) *Hiatt v. Hillman* (1871) 19 W.R. 694.

(*a*) *Kelly v. Imperial Loan and Investment Co.* (1884) 11 Ont. App. 526; affirmed (Strong and Henry, JJ. dissenting) 11 S.C.R. 516. See *Maundrell v. Maundrell* (1802) 7 Ves. 566; 10 Ves. 246; *Bennett v. Aburrow* (1803) 8 Ves. 609; *Wade v. Paget* (1784) 1 B.C.C. 363; *Carver v. Richards* (1860) 27 Beav. 488.

(*b*) *Chatfield v. Cunningham* (1892) 23 Ont. 153; following *Carver v. Richards* (1860) 27 Beav. 488; *Kelly v. Imperial Loan and Investment Co.* (1884) 11 Ont. App. 526; 11 S.C.R. 516.

Protection of purchasers. Section 21 of the *Act respecting Mortgages of Real Estate* (c) provides as follows:—

21. When a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that such power has been improperly or irregularly exercised, or that no such notice as aforesaid has been given; but any person damaged by any such unauthorized, improper, or irregular exercise of such power, shall have his remedy against the person selling.

Purchaser under English act.

The corresponding section of the Imperial *Conveyancing and Law of Property Act, 1881*, (44 & 45 Vict. c. 41, s. 21, sub-s. 2) provides that where *a conveyance is made* in professed exercise of the power of sale conferred on mortgagees by the act, the title of the purchaser shall not be impeached on the ground that the power was improperly exercised; therefore, until the conveyance has been obtained a person who has contracted to purchase from a mortgagee purporting to sell under the statutory power is not precluded from enquiring whether the vendor was in a position to exercise the power, or from proving *aliunde*, in answer to an action of specific performance, that the power was improperly exercised (d).

The protection afforded extends only to the statutory power of sale and the purchaser is protected only where there is a professed exercise of such power. The conveyance to the purchaser should therefore recite the power. And the protection of the statute, as well as that usually provided in express powers of sale, extends only to purchasers without notice, actual or constructive, of any impropriety or irregularity (e).

Thus in a New Brunswick case a power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at

(c) R.S.O. (1897) c. 121.

(d) *Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society* [1898] 2 Ch. 230; explaining and distinguishing *Dicker v. Angerstein* (1876) 3 Ch. D. 600.

(e) *Bailey v. Barnes* [1894] 1 Ch. 25, C.A.

public or private sale and for the best price that could be obtained for them, and to execute all necessary receipts, etc., which receipts "should effectually exonerate every purchaser or other person taking the same from all liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, misapplication or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted; and he appropriated the proceeds. The purchaser paid the note to the holders at maturity. It was held by the Supreme Court, affirming the judgment of the court below, that the power of attorney did not authorize a sale upon credit, and the sale by the agent was therefore invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good (f).

The purchaser is protected even although the mortgage has been wholly paid off before the sale (g).

Section 19 of the *Act respecting Mortgages of Real Estate* (h) provides as follows regarding sales under the statutory power:—

19. Receipts for purchase money given by the person or persons exercising the power of sale by the preceding section conferred, shall be sufficient discharges to the purchaser, who shall not be bound to see to the application of the purchase money.

Purchaser
not bound to
see to applica-
tion of
purchase
money. °

By section 14 of the *Act respecting Mortgages of Real Estate* (i) it is enacted that—

14. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and

(f) *Rodburn v. Swinney* (1889) 16 S.C.R. 297.

(g) *Dicker v. Angerstein* (1876) 3 Ch. D. 600.

(h) R.S.O. (1897) c. 121.

(i) R.S.O. (1897) c. 121.

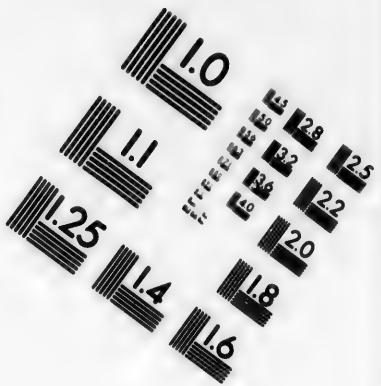
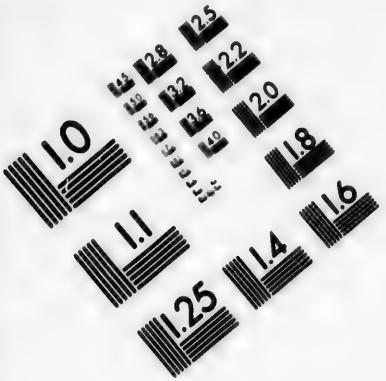
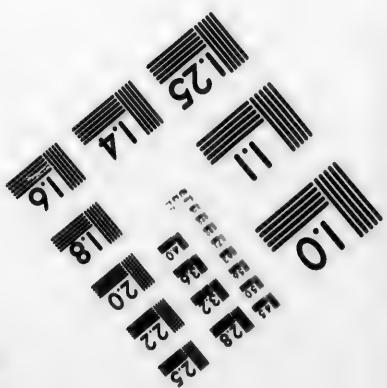
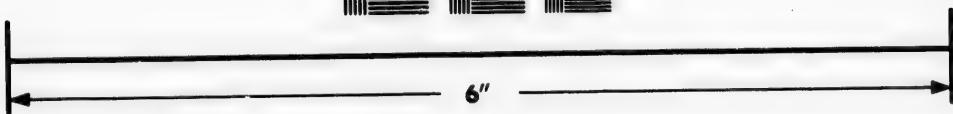
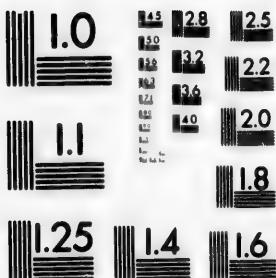


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receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security (j).

This protection extends to purchases under powers either expressed in the mortgage deed or statutory.

Improvements by purchaser when sale set aside.

Where a sale under a power of sale in a mortgage was irregular and was therefore set aside, it was held that the purchaser should be allowed, as a condition of relief against him, for all improvements made under the belief that he was absolute owner so far as they enhanced the value of the property, and not merely for such improvements as a mortgagee in possession would have been entitled to make, knowing that he was mortgagee (k).

Impeaching sale for inadequacy of price.

Unless the inadequacy of the price paid is so great as to raise a presumption of fraud, the sale to the purchaser is valid, even although the mortgagee may be liable to the owner of the equity of redemption for a greater sum than was realized (l).

Onus when sale impeached.

If a conveyance executed in pursuance of a sale under power is impeached, the purchaser, or those claiming under him, must show a due exercise of the power of sale; the onus of impeaching it is not upon the party alleging the invalidity of the conveyance (m).

Where a creditor of the mortgagor recovers judgment and issues execution after a sale under power of sale is

(j) See also the *Trustee Act*, R.S.O. (1897) c. 120, s. 9.

(k) *Carroll v. Robertson* (1868) 15 Gr. 173; *McLaren v. Fraser* (1870) 17 Gr. 567; see the *Act respecting the Law and Transfer of Property* R.S.O. (1897) c. 119, s. 30:—In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required, to retain the land if the Court is of opinion or requires that this should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct.

(l) *Chatfield v. Cunningham* (1892) 23 Ont. 153; *Latch v. Furlong* (1866) 12 Gr. 303; *Warner v. Jacob* (1882) 20 Ch. D. 220.

(m) *Bartlett v. Jull* (1880) 28 Gr. 140.

complete and the mortgaged lands have been conveyed to the purchaser, he has no status to attack the sale proceedings or to require an account from the mortgagee (*n*).

By section 27 of the *Act respecting Mortgages of Real Estate* (*o*) it is enacted as follows:—

27. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession on power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and was then vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate is outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Right in
case of
implied
power to
call for title
deeds and
conveyance
of legal
estate.

x. Application of Proceeds of Sale.

If the power of sale is under the short forms act (*p*) the mortgagee holds the proceeds of sale upon trust:

Application
of proceeds
where power
under short
forms act.

(1) To pay all costs and charges in connection with the sale, or incurred for taxes, rent, insurance and repairs, and all other costs and charges incurred in and about the execution of the trust;

(2) To pay the principal and interest thereon to day of payment;

(3) To pay the surplus, if any, to the mortgagor, his heirs, executors, administrators or assigns, or as he shall direct and appoint.

By section 25 of the *Act respecting Mortgages of Real Estate* (*q*) it is enacted as follows:—

Where power
implied by
statute.

25. The money arising by a sale effected as aforesaid shall be applied by the person receiving the same as follows: firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then

(*n*) *Chatfield v. Cunningham* (1892) 23 Ont. 153.

(*o*) R.S.O. (1897) c. 121.

(*p*) R.S.O. (1897) c. 126, Schedule B (14).

(*q*) R.S.O. (1897) c. 121.

due in respect of the charge in consequence whereof the sale was made; and thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such moneys shall be paid to the subsequent incumbrancers according to their priorities, and the balance to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be.

**Right of
mortgagee
to arrears of
interest
when pro-
ceedings are
judicial.**

In an action for foreclosure or redemption, if no subsequent incumbrancer intervenes, the mortgagee is entitled to recover from the mortgagor ten years' arrears of interest (*r*). As against a subsequent incumbrancer the mortgagee may recover in an action for foreclosure or redemption only six years' arrears of interest, even if the mortgage deed contains a covenant for payment of the interest (*s*).

It has been held in England that a mortgagor bringing an action to redeem will be required to pay all arrears of interest (*t*).

**Arrears of
interest when
proceedings
are under
power of
sale.**

But a mortgagee who has exercised a power of sale, whether express or conferred by statute, is entitled to retain out of the purchase money all arrears of interest (*u*).

And where the purchase money had been paid into court, and the trustees of the mortgagee petitioned for payment out of the money to be applied on nearly twenty years' arrears of interest, it was held that this was not a suit to recover money charged upon or payable out of the land within the meaning of the statute and that the trustees were entitled to the moneys (*v*). The case of

(*r*) R.S.O. (1897) c. 72, s. 1; c. 133, s. 17; *Carroll v. Robertson* (1868) 15 Gr. 173; *Taylor v. Hargrave* (1872) 19 Gr. 271; *Howeren v. Bradburn* (1875) 22 Gr. 96; *Allan v. McTavish* (1878) 2 Ont. App. 278; *Macdonald v. McDonald* (1886) 11 Ont. 187; *McMicking v. Gibbons* (1897) 24 Ont. App. 586; *Dingle v. Coppen* [1899] 1 Ch. 726.

(*s*) *McMicking v. Gibbons* (1897) 24 Ont. App. 586, overruling on this point *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11.

(*t*) *Dingle v. Coppen* [1899] 1 Ch. 726.

(*u*) *Edmunds v. Waugh* (1866) L.R. 1 Eq. 418; *In re Marshfield, Marshfield v. Hutchings* (1887) 34 Ch. D. 721; *Dingle v. Coppen* [1899] 1 Ch. 726; notwithstanding *Mason v. Broadbent* (1863) 33 Beav. 296.

(*v*) *Edmunds v. Waugh* (1866) L.R. 1 Eq. 418.

Edmunds v. Waugh just cited has been explained as being based on the principle of retainer (*w*).

It has been laid down in many English cases that the mortgagee is a trustee for the mortgagor or other person interested in the equity of redemption of the surplus proceeds of sale, after retaining thereout the principal and interest, and the charges and costs to which the mortgagee is entitled; and that he is answerable if he pays the surplus to the wrong persons (*x*). Surplus
proceeds
of sale.

In *Reddick v. Traders Bank of Canada* (*y*) Boyd, C. said that a mortgagee with surplus moneys in his hands derived from the sale of the mortgaged lands is not a trustee in the ordinary sense, but that he is rather in the position of one holding money to the use of the mortgagor and those claiming under him, who may sue for the surplus as money had and received upon the common money counts.

In *Giles v. The Hamilton Provident and Loan Society* (*z*) it was held that the mortgagees were trustees of the surplus funds in their hands, following the English cases in preference to the view expressed in *Beatty v. O'Connor* (*a*).

In *Biggs v. Freehold Loan and Savings Company* (*b*) the Court of Appeal held that where the mortgage is made under the short forms act and provides that the mortgagee shall be possessed of the moneys to arise from any sale, upon trust to pay the costs and charges and the principal and interest of the debt, and upon further trust

(*w*) *In re Stead's Mortgaged Estates* (1876) 2 Ch. D. 713.

(*x*) *Tanner v. Heard* (1857) 23 Beav. 555; *Charles v. Jones* (1887) 35 Ch. D. 544; *Magnus v. Queensland National Bank* (1888) 37 Ch. D. 466, C.A.

(*y*) (1892) 22 Ont. 449, following *Beatty v. O'Connor* (1884) 5 Ont. 747, and referring to *In re Gregson, Christison v. Bolam* (1887) 36 Ch. D. 223.

(*z*) (1895) 10 Man. R. 567.

(*a*) (1884) 5 Ont. 747.

(*b*) (1899) 26 Ont. App. 232.

to pay the surplus, if any, to the mortgagor, the mortgagee is an express trustee of the proceeds of sale (c).

The mortgagee is entitled to pay the surplus to the apparent owner of the equity of redemption, unless he has actual notice of other claims (d). It is doubtful whether a mortgagee is entitled to pay the surplus proceeds into court under the provisions of the *Imperial Trustee Relief Act* (e). But it has been held in England that where the mortgagee is in doubt as to the persons entitled to receive the surplus proceeds of sale he may take out an originating summons to have the question determined (f).

Payment of married woman's dower into court.

Mortgagee retaining surplus moneys liable to pay interest thereon.

A mortgagee holding any money out of which a married woman shall be dowable under the *Dower Act* (g) may pay the same into the High Court to the credit of the married woman and other persons interested therein. And the High Court or a judge thereof may make such order as may be just for securing the married woman's right of dower in the money (h).

If the mortgagee continues to hold the surplus moneys it is his duty to set apart and invest them for the benefit of the persons who may establish their claim thereto; and if he neglects to do so he will be chargeable with interest from the completion of the sale (i).

(c) *Biggs v. Freehold Loan and Savings Co.* (1899) 26 Ont. App. 232, referring to *In re Bell, Lake v. Bell* (1886) 34 Ch. D. 462; *Thorne v. Heard* [1893] 3 Ch. 530; [1894] 1 Ch. 599; [1895] A.C. 495.

(d) *Harper v. Culbert* (1883) 5 Ont. 152.

(e) 10 & 11 Vict. (1847) c. 96; *Re Kingsland* (1879) 8 P.R. 77; *Western Canada L. & S. Co. v. Court* (1877) 25 Gr. 151.

(f) *Re Cook's Mortgage, Lawledge v. Tyndall* [1896] 1 Ch. 923. As to originating notices see Ont. Rule 938.

(g) R.S.O. (1897) c. 164, ss. 7, 8.

(h) R.S.O. (1897) c. 164, s. 9.

(i) *Charles v. Jones* (1887) 35 Ch. D. 544.

CHAPTER XVI.

FORECLOSURE OR SALE.

SECTION I.

GENERAL PRINCIPLES.

It has been seen that every mortgage imports a right of foreclosure, except in the case of a Welsh mortgage which is peculiar in its nature (*a*). This will be evident from a consideration of the principles upon which courts of equity allow redemption. At common law the mortgage becomes absolute on breach of the condition, and according to its strict terms the mortgagor is then foreclosed. The court interferes to give the mortgagor an opportunity to redeem after the breach of the condition, and if he fails to redeem at the time appointed for redemption the foreclosure which would have followed at law is then allowed to take effect. So that the right of foreclosure is a necessary incident to every instrument which the court treats as a mortgage.

Foreclosure
an incident
of every
mortgage.

A mortgagee may foreclose without taking possession (*b*); and whether he has a power of sale or not (*c*); and whether the mortgage is a legal mortgage, or a mortgage of the equity of redemption, or an agreement for a mortgage, or an equitable mortgage created by deposit of title deeds (*d*).

But where the security is a mere charge or lien and not in the nature of a mortgage or an agreement for a When sale is
the proper
remedy.

(*a*) *Sadler v. Worley* [1894] 2 Ch. 170.

(*b*) *Lord Penrhyn v. Hughes* (1799) 5 Ves. 99.

(*c*) *Slade v. Rigg* (1843) 3 Hare 35.

(*d*) *Richards v. Cooper* (1842) 5 Beav. 304; *Frail v. Ellis* (1852) 16 Beav. 350; *James v. James* (1873) L.R. 16 Eq. 153; *York Union Banking Co. v. Artley* (1879) 11 Ch. D. 205.

mortgage, the proper remedy is an action for sale to realize the security, and not foreclosure (e).

Lien notes.

It is apprehended that sale and not foreclosure is the proper remedy under that class of informal instruments commonly called "lien notes." These are in the form of promissory notes usually given for an advance of money or for the price of goods sold, with an agreement that the amount shall be a charge or lien on the lands (describing them) of the promisor or that the lands shall be pledged for payment of the amount. These instruments are recognized and provided for by sections 43 and 85 of the *Registry Act* (f).

Right of
foreclosure
arises on
default.

As a general rule and in the absence of any agreement to the contrary the mortgagee may upon default in payment of the moneys secured by a mortgage, whether he has taken possession or not, bring his action to foreclose the mortgagor of his equity of redemption (g). Until the estate has become forfeited at law by default in payment at the appointed day the mortgagee cannot maintain an action of foreclosure; but default in payment of interest will be sufficient (h). The mortgagee may, however, agree to forego his right of foreclosure for a stated time, whether it be for a period of years or for the life of the mortgagor or other person (hh).

Agreement
to postpone
right of
foreclosure.

No fore-
closure for
unpaid costs.

In Wanson v. Harper
8 P.L.R. 88

The right to foreclose continues until the mortgage is wholly paid off, even although the mortgagor has given notice after default that he will pay off the moneys due at a certain day. But where the principal and interest have been paid it has been held that foreclosure cannot be brought for non-payment of the balance of costs unpaid (i).

(e) *Tenant v. Trenchard* (1869) 4 Ch. 537.

(f) R.S.O. (1897) c. 136.

(g) *Balfe v. Lord* (1842) 2 Dr. & War. 480; 18 R.C. 481.

(h) *Stanhope v. Manners* (1763) 2 Eden 196.

(hh) *Burrowes v. Molloy* (1845) 2 J. & L. 521.

(i) *Drought v. Redford* (1827) 1 Moll. 572.

If a mortgagee obtains foreclosure before realizing on collateral securities he thereby deprives himself of the benefit of such securities (*j*). Effect of foreclosure on collateral securities.

The rights of mortgagor and mortgagee are reciprocal, and in so far as the right to redeem is shewn the right to foreclose is thereby established, although the identical conditions attached to the one right may not be attached to the other (*k*).

(*j*) *Dyson v. Morris* (1842) 1 Hare 413.

(*k*) *Parker v. The Vine Growers' Association* (1876) 23 Gr 179.

SECTION II.

ACTION FOR FORECLOSURE OR SALE.

i. *Mortgagee entitled to Foreclosure or Sale.*

Mortgagee
entitled to
foreclosure
or sale;
and personal
judgment.

A mortgagee may claim foreclosure of the equity of redemption or a sale of the mortgaged premises, and in either case payment of the mortgage debt by any party personally liable therefor (*l*). And the court may direct a sale instead of foreclosure on such terms as may seem just and even after judgment of foreclosure has been entered (*m*).

A mortgagee is usually entitled to foreclosure or sale at his option (*n*). His right to foreclose is not affected by reason of his having a power of sale (*o*).

Foreclosure
or sale
may be
refused.

But in some cases the court will not decree sale but foreclosure only, and in other cases sale only will be directed and foreclosure refused.

Lands out
of the
jurisdiction.

Thus, where the mortgaged lands are situate out of the Province foreclosure will be granted against a defendant residing in the Province, the judgment operating merely *in personam* as an extinguishment of a personal right (*p*); but the court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able to supervise or deal effectually with the many

(*l*) Ont. Rule 378.

(*m*) Ont. Rule 379.

(*n*) *Meyers v. Harrison* (1850) 1 Gr. 449. The Ontario County Courts have jurisdiction in an action by a legal or equitable mortgagee, whose mortgage has been created by some instrument in writing, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed does not exceed \$200; R.S.O. (1897) c. 55, s. 23, sub-s. 11.

(*o*) *Slade v. Rigg* (1843) 3 Hare 35; *Wayne v. Hanham* (1851) 9 Hare 62; *Perry v. Keane* (1836) 6 L.J.N.S. Ch. 67.

(*p*) *In re Hawthorne* (1883) 23 Ch. D. 743.

matters which are the usual and ordinary incidents of a sale (q).

The jurisdiction of the court in such cases is founded upon the existence of some contractual obligation, express or implied, or some trust or equity between the parties, which the court acting *in personam* and upon the conscience of the party affected by it will enforce in that manner (r).

In *Grey v. Man. & N. W. Ry.* (s) the Manitoba Court granted judgment for the sale of a mortgaged railway part of which extended beyond the limits of Manitoba.

Where the mortgage is in the form of a trust for sale the court will not direct foreclosure, but sale only (t).

Mortgage by way of trust for sale.

In some reported cases it has been doubted whether a mortgagee is entitled to sale where the mortgage is by deposit of title deeds unaccompanied by an agreement to execute a legal mortgage; but it may be said to be settled that an equitable mortgagee by deposit of title deeds, with or without a memorandum of charge or agreement to execute a legal mortgage, is entitled to either foreclosure or sale (u).

A subsequent mortgagee cannot as plaintiff have a sale against a prior mortgagee. If a subsequent incumbrancer

Subsequent mortgagee not entitled to sale as against prior mortgagee.

(q) *Strange v. Radford* (1857) 15 Ont. 145; *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444; *Page v. Ede* (1874) L.R. 18 Eq. 118; *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602; *Westlake on Private International Law*, 3rd ed. (1890) 189, 194.

(r) *Henderson v. Bank of Hamilton* (1893) 20 Ont. App. 646; 23 S.C.R. 716; reversing judgment of Divisional Court, 23 Ont. 327; *Ewing v. Orr Ewing* (1883) 9 App. Cas. 34.

(s) (1895) 31 C.L.J. 324.

(t) *Paton v. Wilkes* (1860) 8 Gr. 252.

(u) *Frail v. Ellis* (1852) 16 Beav. 350; *Moore v. Perry* (1855) 1 Jur. N.S. 126; *James v. James* (1873) L.R. 16 Eq. 153; *Backhouse v. Charlton* (1878) 8 Ch. D. 444; *York Union Banking Co. v. Artley* (1879) 11 Ch. D. 205; *Oldham v. Stringer* [1884] W.N. 235; *Cripps v. Wood* (1882) 51 L.J. Ch. 584; see *Kerr v. Beebe* (1866) 12 Gr. 204: it was held that although an equitable mortgagee by deposit of title deeds could not insist upon a sale, a sale might be directed at the request of a subsequent incumbrancer or the mortgagor.

is brought into court by a prior incumbrancer he may obtain a sale on proper terms; but if a subsequent incumbrancer brings an action and makes the prior incumbrancer a party thereto, the former is limited to his right to redeem the earlier mortgage (v).

**Foreclosure
refused
against
the Crown.**

The court will not order foreclosure against the Crown. Where the equity of redemption is held by the Crown the mortgagee may be allowed in default of payment to take possession until the Crown shall think proper to redeem (w); or until satisfaction of the debt (x). The court may direct a sale of the mortgaged lands if the Crown consents or does not object (y).

**Municipal
corporation
entitled to
foreclosure.**

A mortgagee of a railway is not entitled to either sale or foreclosure; he is only entitled to the appointment of a receiver or a manager of the undertaking (z).

Bank.

Although it would be more in accordance with the policy of the Mortmain Acts that municipal corporations should not acquire property by foreclosure, still as municipal corporations are empowered to invest surplus moneys in first mortgages on farm property (a), they are entitled to ask foreclosure of such mortgages (b). A chartered bank is entitled to foreclosure (c).

**Foreclosure
or sale where
infants
interested.**

Where infants are interested in the equity of redemption the court may direct an enquiry whether a sale will be for the benefit of the infants. Formerly where infants were interested the mortgagee's consent to a sale in lieu of

(v) *Campbell v. McDougall* (1880) 5 Ont. App. 503; *sub nom. McDougall v. Campbell* (1887) 6 S.C.R. 502.

(w) *Reeve v. Attorney-General* (1741) 2 Atk. 223; *Dunn v. Attorney-General* (1864) 10 Gr. 482.

(x) *Hodge v. Attorney-General* (1839) 3 Y. & C. 342.

(y) Seton 5th ed. 1585.

(z) *Galt v. Erie and Niagara Ry. Company* (1868) 14 Gr. 499; *Peto v. Welland Ry. Company* (1862) 9 Gr. 455; *Furness v. Caterham Ry. Company* (1858) 25 Beav. 614.

(a) *The Municipal Act*, R.S.O. (1897) c. 223, s. 420, sub-s. 1.

(b) *Municipality of Oxford v. Bailey* (1866) 12 Gr. 276.

(c) *Bank of Upper Canada v. Scott* (1858) 6 Gr. 451.

foreclosure was required (*d*); but the court has power now to order a sale without the consent of the mortgagee (*e*). Where infants were concerned and it appeared from the evidence taken before the Master that a sale would not realize the plaintiff's claim, foreclosure was decreed against the Master's order for sale (*f*).

The court either before or after judgment of foreclosure may direct a sale of the property instead of foreclosure of the equity of redemption (*g*). A sale may be directed at the request of the mortgagor, or of a subsequent incumbrancer, or of any person claiming under them respectively (*h*). The party requesting sale is required to deposit in court the sum of \$80 for the purpose of covering expenses (*i*). In Manitoba it was held that the court had no power to make an order for sale after there had been a decree of foreclosure except by the consent of all parties interested, and that the decree could be varied only on a rehearing (*j*).

Ontario Rule 381 provides as follows:—

381. Where a defendant by writ in an action for foreclosure desires a sale, but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file a memorandum, entitled in the action, to the following effect:

"I desire a sale of the mortgaged premises instead of foreclosure."

And he shall attach thereto a certificate of the Accountant to the effect that he has deposited in court to the credit of the action the sum of \$80 to meet the expenses of the sale.

(*d*) *Williamson v. Gordon* (1812) 19 Ves. 113; *Mallack v. Galton* (1734) 3 P. Wms. 352; *Lyne v. Willis* (1730) 3 P. Wms. 352, n.; *Bishop of Winchester v. Beavor* (1797) 3 Ves. 31; *Booth v. Rich* (1684) 1 Vern. 295; *Gundry v. Baynard* (1704) 2 Vern. 479; *Taylor v. Philips* (1750) 2 Ves. Sen. 23.

(*e*) Ont. Rule 379.

(*f*) *Landed Banking and Loan Co. v. Anderson* (1886) 3 Man. R. 270.

(*g*) Ont. Rule 379.

(*h*) Ont. Rule 380.

(*i*) Ont. Rule 380.

(*j*) *Credit Foncier Franco-Canadien v. Schultz* (1894) 14 C.L.J. 323; 10 Man. L.R. 158.

Sale instead
of foreclosure
at request of
subsequent
incumbran-
cer.

Notice and
deposit when
sale desired.

The defendant desiring sale is then entitled to have the judgment drawn up for sale instead of foreclosure. An incumbrancer made a party in the Master's office may in the same way obtain a sale of the mortgaged lands (*k*).

The court will not increase the amount of the deposit, even although the costs of sale exceed \$80 (*l*). But the plaintiff may notify the defendant who requests a sale to take the conduct of it (*m*). The deposit may be dispensed with in the case of infant defendants entitled to a sale (*n*).

**Application
of deposit.**

If the mortgagor makes the deposit for the purpose of having a sale instead of foreclosure, and the proceeds of the sale are more than sufficient to pay the plaintiff but are insufficient to pay the subsequent incumbrancers, the mortgagor is not entitled to a return of the deposit but it must be applied in reduction of the second mortgagee's claim (*o*).

A mortgagee may lose his right to either sale or foreclosure by having sold or parted with part of the mortgaged property without the concurrence of a person to whom the equity of redemption in the remainder has been conveyed. If, however, the sale is made under a power of sale contained in the mortgage it will not affect the mortgagee's right to bring an action for foreclosure or sale in respect of the remaining part (*p*).

And where A. advanced \$2,000 to B. taking two mortgages each for \$1,000 on separate properties, and the mortgagee foreclosed one of the mortgages and then parted with the property, it was held that this was no bar to a

(*k*) Ont. Rule 382.

(*l*) *Cruso v. Close* (1879) 8 P.R. 33.

(*m*) Ont. Rule 383.

(*n*) *Bank of Upper Canada v. Scott* (1858) 6 Gr. 451; *Lawrason v. Fitzgerald* (1862) 9 Gr. 371. But see *Western Canada L. & S. Co. v. Dunn* (1883) 9 P.R. 587.

(*o*) *Gzowski v. Beaty* (1879) 8 P.R. 146.

(*p*) *Gowland v. Garbutt* (1867) 13 Gr. 578; and see *Crawford v. Armour* (1867) 13 Gr. 576; *Munson v. Hauss* (1875) 22 Gr. 279.

**Both fore-
closure and
sale may be
refused.**

foreclosure of the other mortgage (*q*). A mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot foreclose that mortgage with the others (*r*).

Section 37 of the *Land Titles Act* provides as follows:—

37. Subject to any entry to the contrary on the register the registered owner of a registered charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time (*s*).

Mortgages
under Land
Titles Act.

ii. *Parties to the Action.*

(a) *Plaintiffs.*

A person cannot be both plaintiff and defendant in the same action; and where the plaintiff was also made defendant in another capacity his name was struck out as defendant (*t*).

A person
cannot be
both plain-
tiff and
defendant.

If there are several mortgagees they must all be parties to the action, whether they be joint tenants under the statute (*u*) or tenants in common of the moneys secured by the mortgage. And, therefore, one of the mortgagees may bring a foreclosure action and make his co-mortgagees defendants, if they will not join as plaintiffs (*v*). Where several persons have advanced mortgage moneys in distinct shares, one of such persons cannot maintain an action for foreclosure of a proportionate part of the estate (*w*). In such a case one of the mortgagees may bring an action to foreclose the mortgage making his co-mortgagees defendants, and is entitled to judgment for foreclosure on default

One of
several
mortgagees.

(*q*) *Bald v. Thompson* (1869) 16 Gr. 177.

(*r*) *Thibodo v. Collar* (1850) 1 Gr. 147.

(*s*) R.S.O. (1897) c. 138, s. 37.

(*t*) *Wavell v. Mitchell* [1891] W.N. 86; 64 L.T. 560.

(*u*) R.S.O. (1897) c. 121, s. 13.

(*v*) *Luke v. South Kensington Hotel Company* (1879) 11 Ch. D. 121.

(*w*) *Palmer v. The Earl of Carlisle* (1823) 1 S. & St. 423; see *Remer v. Stokes* (1856) 4 W.R. 730.

in payment of the whole mortgage debt in the proportions due to the several mortgagees respectively (*x*). A bill for foreclosure filed by the survivor of three joint trustee mortgagees, who had no beneficial interest in the mortgage moneys, was properly brought, the representatives of the deceased trustees not being necessary parties (*y*).

Trustees,
executors
and adminis-
trators.

Under the *Devolution of Estates Act* (*z*) all property real and personal of a person dying on and after the first day of July, 1886, devolves upon and becomes vested in his legal personal representatives from time to time.

Section 11 of the *Act respecting Mortgages of Real Estate* (*a*) provides as follows:—

11. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release, or discharge shall be as effectual as if the same had been made by the person having the mortgagee's estate.

Ontario Rule 193 is as follows:—

193. Trustees, executors and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the court or a judge may at any time order any of them to be made parties in addition to, or in lieu of, the previous parties.

In a suit brought by executors of a mortgagee to foreclose it was held that the heirs of the deceased mortgagee or the persons beneficially entitled under his will were not necessary parties (*b*).

(*x*) *Davenport v. James* (1847) 7 Hare 249.

(*y*) *Laudale v. McLaren* (1892) 8 Man R. 322.

(*z*) R.S.O. (1897) c. 127, s. 4.

(*a*) R.S.O. (1897) c. 121.

(*b*) *Lawrence v. Humphries* (1865) 11 Gr. 209.

Where a mortgage is vested in trustees the *cestui que trust* or one of the *cestuis que trust* may bring action for foreclosure of the entire mortgaged estate. But the trustees must be made parties to such an action (c). *Cestui que trust* entitled to foreclose.

Where a mortgage is taken in the name of one partner to secure a partnership debt and a bill is filed to enforce the security, the representatives, real or personal, of a deceased partner are not necessary parties (d). Surviving partner may enforce mortgage.

The *Married Women's Property Act* (e) enacts that every woman whether married before or after the act shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*. When, therefore, a married woman advances on mortgage moneys which are her separate property, it is no longer necessary that she should sue for foreclosure or sale by a next friend, or that she should give security for costs (f). Married woman.

Ontario Rule 217 provides as follows:—

Lunatic mortgagee.

217. Where a lunatic or a person of unsound mind (not so found by inquisition or judicial declaration) might before the passing of *The Ontario Judicature Act, 1881*, have sued or have been sued, he may as heretofore sue by his committee or next friend, and may defend by his committee or guardian.

A lunatic so found by inquisition or judicial declaration (g) and having a committee must sue by him. If the lunatic is confined in a public asylum it is discretionary with the Inspector of Prisons and Public Charities to institute proceedings on behalf of the lunatic (h). The committee must not institute an action on behalf of the

(c) *Wood v. Williams* (1819) 4 Madd. 186; 20 R.R. 291.

(d) *Stephens v. Simpson* (1866) 12 Gr. 493.

(e) R.S.O. (1897) c. 163, s. 15.

(f) *Threlfall v. Wilson* (1883) 8 P.D. 18.

(g) R.S.O. (1897) c. 65, s. 8.

(h) R.S.O. (1897) c. 317, ss. 53, 56; *Mastin v. Mastin* (1893) 15 P.R. 177.

lunatic without the sanction of the court (*i*). If an action can be shewn to be not to the benefit of the lunatic it will be stayed on application (*j*).

**Suing by
next friend.**

If the lunatic has no committee he may sue by a next friend who may be any person willing to act (*k*). It is not necessary that the next friend should be a solvent person (*l*). No person shall be added or substituted as the next friend of a plaintiff without his own consent in writing to be filed (*m*).

The established practice is that a married woman cannot fill the office of next friend (*n*).

**Assignee of
mortgage.**

58. (5) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor.

Where an assignment of a mortgage absolute in form is made under this section the property in the mortgage and the right to sue thereon vest in the assignee alone, subject to the equities, if any, specified in the section; and the assignee only can sue on the mortgage.

Assignments made before the 31st day of December,

(*i*) Dan. Prac. 6th Ed. 118.

(*j*) *Waterhouse v. Worsnop* (1888) 59 L.T. 140.

(*k*) *Skinner v. White* (1883) 19 C.L.J. 115.

(*l*) *Sharp v. Sharp* (1867) 2 Chy. Ch. 244; *Crumley v. Kingston* (1883) 3 C.L.T. 311.

(*m*) Ont. Rule 206 (3).

(*n*) *Thynne v. St. Maur* (1887) 34 Ch. D. 465; *Mastin v. Mastin* (1893) 15 P.R. 177.

(*o*) R.S.O. (1897) c. 51.

1897, are governed by the *Mercantile Amendment Act* (*p*) which provided as follows:—

6. In the next succeeding six sections of this Act,

“Assignee” shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance or other obligation thereby secured.

7. Every debt and chose in action arising out of contract shall be assignable by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in the action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province.

Under the former act the action could not be maintained by the assignee alone unless he took the beneficial interest in the claim assigned (*q*).

Where the assignment is not absolute but purports to be by way of charge only the assignor is a necessary party; and he may bring action in his own name (*r*).

The express notice in writing to the debtor required by the act is not essential as between the assignor and the assignee (*s*), but must be given to enable the assignee to bring action on the mortgage assigned to him (*t*).

If a sheriff seizes a mortgage under a writ of execution he may bring an action on it for sale or foreclosure (*u*); Sheriff seizing mortgage.

(*p*) R.S.O. (1887) c. 122.

(*q*) *Wood v. McAlpine* (1876) 1 Ont. App. 234; *Searlett v. Nattress* (1896) 23 Ont. App. 297.

(*r*) *Turquand v. Fearon* (1879) 4 Q.B.D. 280; *Prittie v. Connecticut Fire Ins. Co.* (1896) 23 Ont. App. 449; *Durham v. Robertson* [1898] 1 Q.B. 765.

(*s*) *Newman v. Newman* (1885) 28 Ch. D. 674; *Gorringe v. Irwell* (1886) 34 Ch. D. 128.

(*t*) In Nova Scotia it was held that an assignee of a mortgage was entitled to foreclose although he had paid the consideration for the assignment under circumstances alleged to have given him notice that the mortgage was being attacked by creditors of the mortgagor: *McLean v. Chisholm* (1895) 27 N.S.R. 492.

(*u*) R.S.O. (1897) c. 77, s. 25.

**Derivative
mortgagee
may sue in
his own
name.**

but he is entitled to a bond of indemnity against all costs and expenses to be incurred (*v*).

In *National Provincial Bank v. Harle* (*w*) it was held that an assignment of a mortgage with a proviso for redemption was not an absolute assignment within section 25, sub-section 6 of the English *Judicature Act, 1873*, so as to enable the sub-mortgagee to bring an action in his own name for the recovery of the original mortgage debt. But this decision was disapproved of in later cases (*x*); and the question is now settled by the judgment of the Court of Appeal in England holding that a sub-mortgage made in the ordinary form, with a proviso for redemption and re-assignment upon repayment, is an absolute assignment (not purporting to be by way of charge only) within the above mentioned section of the *Judicature Act* (*y*). But where the assignment of mortgage is by way of charge only it is not within the act and the assignee cannot sue in his own name (*z*).

ii. (b) *Original Defendants.*

**Who should
be defen-
dants.**

In actions for foreclosure or sale all persons interested in the mortgage security or in the equit^t of redemption should be made parties and unless all proper parties are before the court judgment will not be given (*a*). The general rule of practice is that parties to an action should be joined at its inception and that after judgment parties cannot be added (*b*). But an exception is made in the case

(*v*) s. 21.

(*w*) (1881) 6 Q.B.D. 626.

(*x*) *Burlinson v. Hall* (1884) 12 Q.B.D. 347; *Tancred v. Delagoa Bay and East Africa Railway* (1889) 23 Q.B.D. 239.

(*y*) *Durham Brothers v. Robertson* [1898] 1 Q.B. 765, C.A.

(*z*) *Durham Brothers v. Robertson* [1898], 1 Q.B. 765, C.A.

(*a*) *Palmer v. Earl of Carlisle* (1823) 1 Sim. & St. 423; 18 R.C. 491.

(*b*) *Johnston v. Consumers' Gas Company* (1896) 17 P.R. 297.

of mortgage actions by Ontario Rule 190 which is as follows :—

190. (1) Where one or more of the persons interested in the equity of redemption are already defendants, and it is made to appear to the court or a judge either upon motion for that purpose, or at the trial or other disposition of the action, that by reason of their number or otherwise it is expedient to permit the action to proceed without the presence of the other persons interested in the equity of redemption, the court or judge may make directions accordingly, and may order such other persons to be made parties in the Master's office after judgment.

(2) Where after judgment it appears that persons are interested in the equity of redemption besides those who are already parties, the court or judge may order such persons or any of them to be made parties in the Master's office upon such terms as may seem just.

Notwithstanding this Rule the court will require the plaintiff to frame his action with diligence and to bring the proper parties before the court in the first instance (*c*). In one case it was said :—

Plaintiff's
duty to make
proper
persons
original
defendants.

"If parties will not take the trouble (more or less according to circumstances) to bring the proper parties before the court, they have only themselves to blame, but they have no right to cast that labour upon the court and turn it into a court of inquiry for their convenience (*d*)."

All persons interested in the ultimate equity of redemption, that is, the mortgagor and all persons claiming through or under him should be made original defendants in an action for foreclosure or sale (*e*). All persons having any lien, charge or incumbrance upon the mortgaged property subsequent to the mortgage should be made parties in the Master's office (*f*). Thus subsequent incumbrancers, execution creditors and persons having mechanics' liens subsequent to the plaintiff should be added in the Master's office and not made original parties (*g*).

(*c*) *Paterson v. Holland* (1860) 8 Gr. 238; *Buckley v. Wilson* (1861) 8 Gr. 566.

(*d*) *Portman v. Paul* (1864) 10 Gr. 458.

(*e*) *Paterson v. Holland* (1860) 8 Gr. 238; *Buckley v. Wilson* (1861) 8 Gr. 566.

(*f*) Ont. Rule 746.

(*g*) *Jackson v. Hammond* (1879) 8 P.R. 157; *Nelson v. Cochrane* (1889) 13 P.R. 76.

Mortgagor
should be
defendant.

If a mortgagor absolutely assigns the equity of redemption he thereby loses his right to redeem; and in that case he is not a necessary party to an action for foreclosure or sale. But it is usual and advisable to make the mortgagor a party, although he may have disposed of the equity of redemption. If any question as to the validity of the mortgage should arise in the action it would be necessary for the proper disposition of such question that the mortgagor should be before the court. The Ontario Rules of Practice and the forms provided by the Rules for mortgage proceedings contemplate making the mortgagor a defendant for the purpose of enforcing against him the claim on the covenant to pay the mortgage debt (*h*).

If a mortgagor has assigned his equity of redemption and the mortgagee makes him a party for the purpose of recovering on the covenant to pay the mortgage debt, the mortgagor's right to redeem revives (*i*).

Assignee
for the
benefit of
creditors of
mortgagor.

In England a bankrupt mortgagor is not a necessary or proper party to an action for foreclosure even although the trustee in bankruptcy disclaims all interest in the equity of redemption (*j*); for during his bankruptcy the mortgagor has no estate or interest in the mortgaged property even although the trustee disclaims (*k*).

In Ontario an assignment for the benefit of creditors under the *Act respecting Assignments and Preferences by Insolvent Persons* (*l*) vests in the assignee any equity of redemption belonging at the time of the assignment to the assignor. As, however, the personal liability of the mortgagor for the mortgage debt continues notwithstanding the assignment for the benefit of creditors, the mortgagor is a

(*h*) See Ont. Rule 378 and Appendix to Rules Form No. 9.

(*i*) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636.

(*j*) *Lloyd v. Lander* (1821) 5 Madd. 282; *Pannell v. Hurley* (1845) 2 Coll. 241; *Kerrick v. Saffery* (1835) 7 Sim. 317; *Collins v. Shirley* (1830) 1 R. & My. 638.

(*k*) *Re Mercer v. Moore* (1880) 14 Ch. D. 287.

(*l*) R.S.O. 1897, c. 147, s. 5.

proper party if payment of the mortgage debt is sought against him. The assignment does not differ in this respect from any other transfer by the mortgagor of his equity of redemption.

Prior to the Ontario Act of 1879 relating to dower (*m*) it was frequently held that a wife who had joined in a mortgage by her husband for the purpose of barring her dower was not a necessary or proper party to an action for foreclosure or sale (*n*). The decisions since the passing of that act are somewhat conflicting, but the result of the authorities appears to be that the wife of a mortgagor who has joined to bar her dower is a proper, if not a necessary, party in the first instance (*o*). But the wife of a purchaser of an equity of redemption is not a proper party to an action of foreclosure (*p*).

Where the husband has joined in a mortgage made by a married woman, and the land mortgaged is such that the husband is entitled to be tenant thereof by the courtesy, he has the right to redeem and is a necessary party to an action for foreclosure or sale (*q*). An equity of redemption is an estate in land (*r*) and the husband is entitled to tenancy by the courtesy in respect of an equitable estate under the same circumstances as would entitle him to be tenant by the courtesy of a legal estate vested in his wife (*s*).

The *Devolution of Estates Act* (*t*) provides that the real and personal property of a person dying on and after the

*Wife of
mortgagor*

*Husband of
mortgagor.*

*Personal
representa-
tives of
mortgagor.*

(*m*) Now R.S.O. (1897), c. 164, ss. 7, 8 and 9.

(*n*) *Moffatt v. Thomson* (1851) 3 Gr. 111; *Davidson v. Boyes* (1873) 6 P.R. 27.

(*o*) *Ayerst v. McClean* (1890) 14 P.R. 15; *Blong v. Fitzgerald* (1893) 15 P.R. 467.

(*p*) *Parker v. Willett* (1889) 22 N.S.R. 83.

(*q*) *Jones v. Meredith* (1739) Bunb. 346, Com. 661.

(*r*) *Casborne v. Scarfe* (1737) 1 Atk. 603.

(*s*) See as to tenancy by the courtesy judgment of Osler, J. A. in *Moore v. Jackson* (1892) 19 Ont. App. 383 at p. 396.

(*t*) R.S.O. (1897) c. 127, s. 4.

1st day of July, 1886, shall devolve upon and become vested in his legal personal representatives from time to time.

Devolution of Estates Act.

13. (1) Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, subject to The Land Titles Act in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisee or heirs beneficially entitled thereto, as such devisees or heirs, (or their assigns, as the case may be,) without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the registry office, or land titles office where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered.

Thus the executor or administrator is the representative of the realty unless (in the case of an administrator) his powers are confined to the personal estate of the deceased (*u*). Such representation continues for twelve months after the death of the testator or intestate, or if a caution or cautions be registered then for twelve months from the time of registration of such caution or the last of such cautions. And if an action for foreclosure or sale be brought while the estate of the deceased mortgagor is vested in his executor or administrator such personal representative will be a necessary party to the action. After the expiration of the time limited by the act the estate will become vested in the heirs or devisees of the mortgagor beneficially entitled thereto or their assigns and they will then be necessary parties to the action.

(*u*) See s. 61 of the *Surrogate Courts Act*, R.S.O. (1897) c. 59:— A person entitled to take out letters of administration of the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased, exclusive of the real estate.

An action for foreclosure of a mortgage against the surviving husband and infant children of the intestate mortgagor was begun before the lapse of twelve months from the death. It was held that the plaintiff was entitled after the lapse of that time to judgment for foreclosure without having a personal representative of the mortgagor before the court, no administrator having been appointed and no caution registered under the act (*v*).

Ontario Rule 195 provides as follows:—

Administrator *ad litem.*

195. Where probate of the will of a deceased person, or letters of administration to his estate, have not been granted, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem.*

This Rule is not intended to transfer the business of the Surrogate Court to the High Court (*w*), and an administrator *ad litem* should be appointed in simple cases only. If it is necessary to deal generally with the estate of a deceased person, application should be made to the Surrogate Court for the appointment of a general administrator.

Appointed in simple cases only.

An administrator *ad litem* may be appointed in actions for foreclosure or sale. Thus a mortgagor who had covenanted to pay the mortgage debt died, and no administration was taken out to his estate. The mortgagees desired a sale of the lands; and if the sale should realize sufficient to satisfy the mortgage debt, it would not be necessary to resort to the mortgagor's estate for payment. It was held proper under the circumstances to appoint an administrator *ad litem* (*x*).

And where the mortgaged lands were not equal in value to the mortgage debt and the mortgagee sought foreclosure only, the mortgagor having left no other estate to

(*v*) *Ramus v. Dow* (1893) 15 P.R. 219.

(*w*) *Meir v. Wilson* (1889) 13 P.R. 33.

(*x*) *Re Chambliss and Canada Life Assurance Company* (1888) 12 P.R. 649.

which resort could be had, an administrator *ad litem* was appointed (y).

Consent of person to be appointed.

Trustees, executors and administrators.

Where trustee sufficiently represents estate.

Infant heirs of mortgagor.

Before a person is appointed an administrator *ad litem* his consent should be filed (z). It is proper to apply before action for the appointment of an administrator *ad litem* (a).

Ontario Rule 193 provides that trustees, executors and administrators may be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the court may at any time order any of the beneficiaries to be made parties in addition to, or in lieu of previous parties.

A trustee will not sufficiently represent the *cestuis que trust* as defendant in a foreclosure action unless he has funds in hands sufficient to enable him to redeem; for all persons must be brought before the court who are interested in the equity of redemption and who may be able and willing to redeem (b). If a trustee becomes bankrupt he cannot properly represent his beneficiaries in a foreclosure action, and the beneficiaries should be made parties (c). But if a trustee unnecessarily makes the *cestuis que trust* parties he may be ordered to pay their costs (d).

If a mortgagor dies intestate since the *Devolution of Estates Act* (e) the infant children of the deceased mortgagor are proper parties to an action for foreclosure or sale

(y) *Cameron v. Phillips* (1889) 13 P.R. 78; *Re Williams and McKinnon* (1891) 14 P.R. 339.

(z) *The Prince of Wales etc. Co. v. Palmer* (1858) 25 Beav. 605; *Hill v. Bonner* (1858) 26 Beav. 372; *Cameron v. Phillips* (1889) 13 P.R. 78; *Re Williams and McKinnon* (1891) 14 P.R. 338.

(a) *Re Chambliss and Canada Life Assurance Co.* (1888) 12 P.R. 649; *Re Williams and McKinnon* (1891) 14 P.R. 338; see form of order appointing administrator *ad litem* before action, settled in *Re Chambliss and Canada Life Assurance Co.* (1888) 12 P.R. 649.

(b) *Goldsmid v. Stonehewer* (1852) 9 Hare App. xxxviii; *Mills v. Jennings* (1880) 13 Ch. D. 639; 6 App. Cas. 698.

(c) *Francis v. Harrison* (1889) 43 Ch. D. 183.

(d) *Re Cooper, Cooper v. Vesey* (1882) 20 Ch. D. 611, C. A.

(e) R.S.O. (1897) c. 127.

and should be made defendants in the first instance. It may be that the record is complete as a matter of title with the general administrator as sole defendant, but the statute was not intended to derogate from the rights of infant beneficiaries and as a matter of procedure they should be made parties (*f*). But where the mortgagor devised and bequeathed all his real and personal estate to his executors in trust, the latter were held to be the only necessary defendants to an action for foreclosure, although the widow and infant children of the deceased mortgagor were in actual possession of the mortgaged lands (*g*).

The general rule is that a prior incumbrancer is not a proper party to an action for foreclosure or sale, the subsequent incumbrancer's right against the prior incumbrancer being only to redeem him. But when the prior mortgage was created by a deed absolute in form the subsequent mortgagee was held to be entitled to bring the prior mortgagee before the court for the purpose of showing that he was a mortgagee and redeemable (*h*). The execution creditors of the alleged mortgagee are necessary parties to such an action (*i*).

A railway company took possession of certain lands and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs who received no notice of and took no part in the arbitration proceedings, and gave no consent to the taking of possession. An award was made but not taken up by the railway company or the owners. In an action by the plaintiffs against the railway company and the

When prior
mortgagee
may be made
a party
defendant.

Railway
company ex-
propriating
mortgaged
lands.

(*f*) *Keen v. Codd* (1891) 14 P.R. 182.

(*g*) *Emerson v. Humphries* (1892) 15 P.R. 84. See *Re Mitchell, Wavell v. Mitchell* [1892] W.N. 11. *Re Booth & Kettlewell's Contract* [1892] W.N. 156; 67 L.T. 551.

(*h*) *Moore v. Hobson* (1868) 14 Gr. 703. See *Rogers v. Lewis* (1866) 12 Gr. 257.

(*i*) *Glass v. Freekleton* (1864) 10 Gr. 470. And see *Darling v. Wilson* 16 Gr. (1869) 255.

owners for foreclosure, it was held that the railway company were proper parties (*j*).

Ontario Rule 189 provides as follows:—

**Surety for
mortgage
debt.**

189. A surety for the payment of a mortgage debt may be made a party to an action for the sale of the mortgaged property.

Where there is a surety for the payment of the mortgage debt in default of payment by the mortgagor, it is desirable to join the surety as a defendant in the action against the mortgagor, because when judgment is recovered against the principal the right of action on the covenant is merged in the judgment and subsequent accruing interest may not be otherwise recoverable against the surety (*k*).

Where the original mortgagee assigned the mortgage to the plaintiff and covenanted for payment it was held that he was not a surety within the meaning of the Rule, but that the contract amounted to a guaranty and that a separate action must be brought (*l*). But it would seem that the several claims arising under the circumstances stated could now be disposed of in one action (*m*).

**Purchaser
of equity of
redemption.**

Although a purchaser from the mortgagor of the equity of redemption covenants with him to pay off the mortgage debt, this, owing to the want of privity, does not entitle the mortgagee to proceed against the purchaser to compel him to perform his covenant (*n*).

**Surety for
deficiency.**

Where the surety by the terms of his agreement has become liable for the deficiency on a mortgage, the mort-

(*j*) *Scottish American Invest. Co. v. Prittie* (1893) 20 Ont. App. 398.

(*k*) *Faber v. Earl of Lathom* (1897) 77 L.T. 168. It was held in Manitoba that a surety for payment of a mortgage is not a proper party to a foreclosure suit and that no personal order can be made against him: *Real Estate Loan Co. v. Molesworth* (1886) 3 Man. R. 116.

(*l*) *Clarke v. Best* (1860) 8 Gr. 7.

(*m*) Ont. Rule 215.

(*n*) *Clarkson v. Scott* (1878) 25 Gr. 373; *The Frontenac Loan & Investment Society v. Hysop* (1892) 21 Ont. 577; *Canada Landed and National Investment Co. v. Shaver* (1895) 22 Ont. App. 377.

gatee cannot require him to pay until the security has been realized and the deficiency ascertained (o).

Where a lunatic or a person of unsound mind (not so found by inquisition or judicial declaration) is a necessary party defendant to an action for foreclosure or sale, he must be represented by his committee if he has one. If he has not been so found by inquisition or judicial declaration, or if he has not a committee, he defends by a guardian *ad litem* (p). The Official Guardian will be the guardian *ad litem* unless the court shall otherwise direct (q). Where the lunatic or person of unsound mind has been found to be so by the court, the Official Guardian may be served without order or notice to the person whom he is called upon to represent (r). If no appearance is entered to the writ of summons on behalf of the lunatic the plaintiff may apply to the court for the appointment of a guardian *ad litem* (s). If the action proceeds without proper representation of the lunatic defendant the proceedings are not merely irregular but void (t).

When a defendant who is liable on the mortgage desires to claim indemnity from his successor in title who has agreed to indemnify him against payment of the mortgage moneys, the defendant may, if the person liable to indemnify him is not a party to the action, serve a third party notice under Rule 209; but if the person liable to indemnify him is already a defendant a notice may be served under Rule 215, and the relief sought may be given in the same action. The Rules in force in Ontario before June, 1894 (u), were not as wide as the present Rules, and the Court of Appeal held that it was not proper

Mesne
purchasers
of mortgaged
lands.

- (o) *Teeter v. St. John* (1863) 10 Gr. 85.
- (p) Ont. Rule 217.
- (q) Ont. Rule 218 (3).
- (r) *Wolff v. Ogilvy* (1888) 12 P.R. 645.
- (s) Ont. Rule 218.
- (t) *Warnock v. Prieur* (1887) 12 P.R. 264.
- (u) Consolidated Rules of 1888, 328, 329, 330, 331, 332, 333.

under the former Rules to join as defendants in an action for foreclosure the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title (*v*) ; but it seems clear that such relief may now be given between co-defendants as well as between a defendant and a third party.

Several assignees of equity of redemption.

Where the mortgaged lands have been sold to several persons the purchasers, however numerous, must be made parties to the action. The mortgagee is entitled to insist that the whole of the mortgaged estate shall be redeemed together (*w*).

Execution creditor of mortgagor.

When an execution against the mortgagor is prior in point of time to the plaintiff's mortgage, and the plaintiff seeks to have the execution postponed, the execution creditor must be made a party defendant in the first instance to the action for foreclosure, and it is not sufficient to add him in the Master's office ; but the plaintiff in one case was allowed to set aside his judgment, add the execution creditor as a party, and amend so as to raise the question of priority (*x*).

Wife of assignee of mortgagor.

When the mortgagor assigns his equity of redemption the wife of the person to whom the assignment is made is not a proper party to an action by the mortgagee for foreclosure (*y*). For dower attaches only to such equitable estates as the husband dies seised of (*z*). But it would seem that if the owner of the equity of redemption should die after judgment but before final order of foreclosure, his wife would have a right to redeem. In that case she

(*v*) *Walker v. Dickson* (1892) 20 Ont. App. 96.

(*w*) *Peto v. Hammond* (1860) 29 Beav. 91; *Buckley v. Wilson* (1861) 8 Gr. 566.

(*x*) *Lally v. Longhurst* (1888) 12 P.R. 510, following *Glass v. Freckleton* (1864) 10 Gr. 470.

(*y*) *Monk v. Benjamin* (1890) 13 P.R. 356.

(*z*) *Dower Act*, R.S.O. (1897) c. 164, s. 2.

is a proper party to the action and a new day should be named to allow her to redeem (a).

Where the owner of lands makes a lease thereof and subsequently mortgages the lands, the mortgagee occupies the position of assignee of the reversion on the lease and holds the lands subject to the lease. But where the mortgagor after making the mortgage leases the lands, the lessee is a purchaser of the equity of redemption *pro tanto* and is entitled to redeem. When therefore the lease is subsequent to the mortgage the lessee should be added as a party to the action (b).

Where a derivative mortgagee brings an action to foreclose the original mortgage, the original mortgagee or his personal representatives must be made parties as having a right to redeem the sub-mortgagee. But if the original mortgagee's interest is wholly gone he is not a necessary party (c). And if the action relates only to the derivative mortgage the original mortgagor is not a necessary party (d).

Lessee of
mortgagor.

Sub-mort-
gagor a
necessary
party,
unless he has
parted with
his interest
in the
mortgage.

ii. (c) *Defendants added in the Master's Office.*

As has been stated, the general rule is that all persons interested in the ultimate equity of redemption should be original parties to the action. But the court may by the judgment in an action for foreclosure or sale direct that persons so interested be made parties in the Master's office instead of being added in the proceedings before judgment. And after judgment an order may be made in chambers adding parties in the Master's office (e). But a direction

(1) Parties
added by
judgment or
order.

(a) *Monk v. Benjamin* (1800) 13 P.R. 356.

(b) *Tarn v. Turner* (1888) 39 Ch. D. 456. See *Martin v. Miles* (1888) 5 Ont. 404; *Anderson v. Stevenson* (1888) 15 Ont. 563; *Collins v. Cunningham, Cunningham v. Drysdale* (1892) 21 S.C.R. 139 at p. 149.

(c) *Hobart v. Abbot* (1731) 2 P. Wms. 643.

(d) *In re Burrell, Burrell v. Smith* (1869) 7 Eq. 399.

(e) Ont. Rule 190. See *Rumble v. Moore* (1868) 1 Chy. Ch. 59; *Municipality of Orford v. Bayley* (1868) 1 Chy. Ch. 272.

Motion to add parties.

to add parties cannot be embodied in a judgment obtained on *præcipe*.

(2) Parties added by Master.

Upon a motion to add parties in the Master's office notice should be given to the parties already before the court, but it is not necessary to notify the persons whom it is intended to add as parties (*f*). The application must be made before final order of foreclosure or sale (*g*).

How parties ascertained in Master's office.

In addition to the provisions of the Rule for adding parties in the Master's office by judgment or order (*h*) the Master is empowered to add all persons appearing to have any lien, charge or incumbrance upon the property in question subsequent to the mortgage (*i*).

Who may be added by Master.

The plaintiff brings into the Master's office certificates of the registrar and sheriff of the county in which the property is situated setting forth all the incumbrances affecting the property. It is sufficient to bring the certificate down to the day subsequent to the issue of the writ; persons acquiring interests *pendente lite* are bound by the proceedings.

The following may be added as parties in the Master's office under Ontario Rule 746:—

(1) Registered subsequent mortgagees, or the personal representatives of any registered subsequent mortgagee who is deceased (*j*).

(2) Persons having mechanics' liens subsequent to the plaintiff (*k*).

(*f*) *Penner v. Canniff* (1868) 1 Chy. Ch. 351; *Rumble v. Moore* (1868) 1 Chy. Ch. 59; *Harrison v. Grier* (1869) 2 Chy. Ch. 440. In *Cummins v. Harrison* (1868) 1 Chy. Ch. 369 the order was granted *ex parte*.

(*g*) *Municipality of Orford v. Bayley* (1868) 1 Chy. Ch. 272; *Street v. Dolan* (1871) 3 Chy. Ch. 227.

(*h*) Ont. Rule 190.

(*i*) Ont. Rule 746.

(*j*) R.S.O. (1897) c. 121, s. 11; c. 127, ss. 3, 4.

(*k*) *Jackson v. Hammond* (1879) 8 P.R. 157.

(3) Execution creditors (*kk*).

(4) Where it is brought to the notice of the Master that there are unregistered liens or charges on the mortgagor's interest in the land, such lienholders should be made parties in the Master's office (*l*).

A creditor of a mortgagee who has obtained an order attaching the mortgage debt but who has not obtained an order to pay over is not an incumbrancer within the meaning of the Rule (*m*). A simple contract creditor who has not recovered judgment and issued execution has no right of redemption and is not a proper party (*n*). Who may
not be added.

ii. (d) *Persons acquiring Interests pendente lite.*

Section 97 of the *Ontario Judicature Act* (*o*) provides that the instituting of an action or the taking of a proceeding in which any title or interest in land is brought in question shall not be deemed notice of the action or proceeding to any person not being a party thereto until a certificate of *lis pendens* has been registered. But no certificate is required to be registered in any action or proceeding for foreclosure or sale upon a registered mortgage.

The general rule is "*pendente lite nihil innovetur*," and persons dealing with the lands which are the subject of the action take subject to the rights of the parties as declared in the action. Persons acquiring interests *pendente lite* need not be added as parties, and though not added are bound by the proceedings. Thus in an action by a mortgagee for foreclosure or sale a person who *pendente lite* takes a subsequent mortgage or other incumbrance on

Doctrine of
lis pendens.

(*kk*) Service of the notice upon the solicitor who represented the execution creditor in the action in which the judgment was recovered is sufficient: Ont. Rule 332.

(*l*) *Canadian Bank of Commerce v. Forbes* (1885) 10 P.R. 442.

(*m*) *Crosbie v. Fenn* (1879) 26 Gr. 283.

(*n*) *Nichol v. Allenby* (1889) 17 Ont. 275.

(*o*) R.S.O. (1897) c. 51.

the lands need not be made a party (*p*). And where a judgment has been recovered against the mortgagor pending the action it is not necessary to make the judgment creditor a party (*q*).

iii. *Writ of Summons.*

**At what time
mortgagee
may begin
action for
foreclosure.**

A mortgagee has a right to begin an action for foreclosure the day after default; and though such a course may be extremely sharp, he cannot be refused his costs (*r*).

**Action on
the covenant
alone.**

A mortgagee with power of sale covenanted that no sale or notice of sale should be made or given or any means taken to obtain possession of the mortgaged premises until after three months' notice to the mortgagor demanding payment. It was held that such notice was unnecessary before filing a bill to foreclose (*s*).

**Special
indorsement.**

If a mortgagee sues on the covenant in the mortgage without claiming foreclosure or sale he may specially indorse the writ of summons under Ontario Rule 138. If the defendant fails to appear the plaintiff may sign final judgment under Rule 575 for the amount claimed in the indorsement together with interest and costs. If the defendant appears the plaintiff may move under Rule 603 for leave to sign final judgment.

The special indorsement must be to the effect of the forms contained in the Appendix to the Ontario Rules. The forms provided by the Rules should be substantially followed in order to entitle the plaintiff to judgment under

(*p*) *Robson v. Argue* (1878) 25 Gr. 407.

(*q*) *Wallbridge v. Martin* (1868) 2 Chy. Ch. 275. Section 100 of the Ont. Jud. Act, R.S.O. (1897) c. 51 is as follows:—Where a certificate of *lis pendens* is vacated, any person may deal in respect to the land, as fully as if such *lis pendens* had not been registered, and it shall not be incumbent on any purchaser or mortgagee to enquire as to the facts alleged in the suit, and the rights of such purchaser or mortgagee shall not be affected by his being aware that the allegations made in the suit were in fact made.

(*r*) *Bennett v. Foreman* (1868) 15 Gr. 117; see *Leeds and Hanley Theatre of Varieties v. Broadbent* [1898] 1 Ch. 343, C. A.

(*s*) *Lamb v. McCormack* (1857) 6 Gr. 240.

Rules 575, 596 or 603, but a departure therefrom in form only will not affect the plaintiff's rights (*t*).

In an action by the assignee of a mortgage for the amount due on the covenant it is not necessary to state in the indorsement on the writ that notice in writing of the assignment has been given to the mortgagor (*u*). Action by assignee of mortgage.

Where a plaintiff seeks foreclosure or sale the writ of summons must be indorsed in accordance with the forms provided in the Appendix to the Rules (*v*). Indorsement when action for fore-closure or sale.

The indorsement on the writ should contain a description of the mortgaged lands. But where the plaintiff by mistake omitted from the description of the lands in the writ of summons a parcel included in the mortgage, an order was made, after judgment and final order of foreclosure, vacating the final order and directing an amendment of the writ and all the proceedings (*w*).

If a plaintiff seeks delivery of possession it is important that the claim should be contained in the indorsement on the writ of summons or in the statement of claim. Formerly where the judgment did not contain an order for possession an order might have been obtained even after final order of foreclosure or sale (*x*). But it would seem that under the present Ontario Rules the order for possession must be included in the judgment; and to entitle the plaintiff to Possession should be specifically claimed.

(*t*) *Anon.* W.N. (1876) 53; *Pherrill v. Forbes* (1880) 8 P.R. 408.

(*u*) *Satchwell v. Clarke* (1892) 66 L.T. 641; 8 Times L.R. 592; see *Ont. Jud. Act*, R.S.O. (1897) c. 51, s. 58, sub-s. 5.

(*v*) Ont. Rule 141; *Canadian Bank of Commerce v. Bricker* (1881) 1 C.L.T. 729; *Hill v. Sidebottom* (1882) 47 L.T. 224.

(*w*) *Clarke v. Cooper* (1892) 15 P.R. 54.

(*x*) Ont. Con. Rule 341 of 1888, now repealed, was as follows: Nothing in these Rules contained shall prevent any plaintiff in an action of foreclosure or redemption or for the immediate payment of the mortgage moneys from asking for or obtaining a judgment or order against the defendant for delivery of the possession of the mortgaged property to the plaintiff either forthwith or on or after a final order for foreclosure or redemption, as the case may be, and such an action shall not be deemed an action for the recovery of land within the meaning of the Rules.

such judgment possession must be claimed by the writ of summons or the statement of claim (*y*).

iv. *Venue.*

Local venue
in
foreclosure
actions
where
possession
claimed.

Ontario Rule 529 provides that where an action is for, or includes a claim for, the recovery of land, the place of trial to be named in the statement of claim shall be the county town of the county in which the land is situate. A former Rule now repealed provided that there should be no local venue for the trial of any actions except an action of ejectment (*z*). It was held under that Rule that an action by a mortgagee for foreclosure, payment and possession of the mortgaged premises was not an action of ejectment within the meaning of the Rule relating to local venue, and that therefore the venue need not be laid in the county in which the lands are situate (*a*). It is to be observed, however, that the words of the present Rule expressly refer to actions in which the recovery of lands is sought and the Rule would seem to include foreclosure actions in which possession of the mortgaged lands is claimed. If the Rule fixes a local venue in actions of foreclosure in which possession of the lands is claimed a difficulty arises which was thus referred to by the late Mr. Dalton, M.C. :—

"If a plaintiff has a mortgage containing lands in several counties, securing one debt, a case common enough, he cannot bring several foreclosure suits. It is plain when you consider the rights of parties in a foreclosure that there can practically be but one suit. The mortgagor must be entitled to redeem all the lands at once by one payment. There must be one trial if a trial at all, and one account taken. Then if there cannot be such a multiplication of proceedings where must be the venue (*b*)?"

(*y*) See *Wills v. Luff* (1888) 38 Ch. D. 197. As to extending the claim contained in the indorsement on the writ of summons by claiming possession in the statement of claim see *Smythe v. Martin* (1898) 18 P.R. 227.

(*z*) Ont. Jud. Act (1881) Rule 254; Con. Rule 653 of 1888.

(*a*) *Seymour v. DeMarsh* (1886) 11 P.R. 472.

(*b*) *Seymour v. DeMarsh* (1886) 11 P.R. 472; see *Kendell v. Ernst* (1894) 16 P.R. 167.

v. *Pleadings.*

Ontario Rule 244 provides as follows:—

244. Wherever a statement of claim is delivered, the plaintiff may therein alter, modify or extend his claim without any amendment to the indorsement of the writ. Claim beyond indorsement on writ.

This Rule applies only where the statement of claim is actually delivered and does not apply where the defendant fails to appear and the plaintiff effects service by posting up a copy of the pleading in the office in which the proceedings are being conducted (*c*). And if the defendant does not appear the plaintiff cannot in his statement of claim extend the claim indorsed on the writ of summons. Thus the plaintiff cannot by claiming payment on the covenant in the statement of claim enlarge the scope of the writ which has not been indorsed with such a claim (*d*). But where the writ of summons in an action by a mortgagee against the mortgagor was indorsed with a claim for an injunction to restrain waste and the statement of claim went further and claimed to recover possession of the land in respect of which the injunction was sought, it was held that what was claimed by the pleading was an "extension" of what was claimed by the writ within the meaning of Rule 244 and that such extension was allowable (*e*).

Where the plaintiff in his statement of claim does not ask for an order for payment of the amount due under the covenant, the court will not make such order, even although the mortgagor does not enter an appearance to the writ (*ee*). And if under such circumstances a judgment is entered, containing a personal order for payment of the

Order for payment of mortgage debt not made unless asked for in statement of claim.

(*c*) Ont. Rule 330.

(*d*) *Law v. Philby* (2) (1887) 35 W.R. 450; 56 L.T. 522. See *Gee v. Bell* (1887) 35 Ch. D. 160.

(*e*) *Smythe v. Martin* (1898) 18 P.R. 227.

(*ee*) *Wethered v. Cox* (1888) W.N. 165; *Faithfull v. Woodley* (1889) 43 Ch. D. 287.

mortgage debt, the judgment is erroneous and will be amended (*f*).

Title claimed must be alleged specifically.

Invalidity of mortgage deed must be raised in pleadings.

Also any special matter affecting the account.

Fraud must be distinctly pleaded.

Statute of Limitations.

Where a party to an action relies upon a title to the lands in question, it is not sufficient to allege that by virtue of divers mesne acts and mesne assurances the title has become vested in him, but he must allege the nature of the deeds and documents on which he relies (*g*).

Questions such as the invalidity of the mortgage deed should be raised by the pleadings and adjudicated upon by the court on the hearing of the cause. Contentions of this kind cannot be raised in the Master's office (*h*).

In an action for foreclosure the mortgagor should plead in his statement of defence any special matter affecting the account between himself and the mortgagee and should raise the matter at the trial, otherwise such special circumstances cannot afterwards be raised on taking the account (*i*).

If a mortgagor sets up the defence of fraud, the fraud must be distinctly pleaded and the facts constituting the fraud must be set out (*j*).

If a mortgagor relies upon the defence that the mortgagee's right of action has been barred by the Statute of Limitations, such defence must be expressly pleaded (*k*). But it is unnecessary to plead the Statute of Limitations in order to prevent the recovery of more than six years' arrears of interest in taking the accounts in the Master's office; the filing of a disputing notice is sufficient (*l*).

(*f*) *Cockenour v. Bullock* (1865) 12 Gr. 138.

(*g*) *Sutcliffe v. James* (1879) 40 L.T. 875: 27 W.R. 750.

(*h*) *Bickford v. Grand Junction Railway Co.* (1877) 1 S.C.R. 696 at p. 725. See *McDougall v. Lindsay Paper Mill Co.* (1884) 10 P.R. 247; 20 C.L.J. 133; *Re Munsie* (1884) 20 C.L.J. 112: *Wiley v. Ledyard* (1883) 10 P.R. 182; 20 C.L.J. 142; *Rowland v. Burwell* (1888) 12 P.R. 607.

(*i*) *Sanguinetti v. Stuckey's Banking Co.* (2) [1896] 1 Ch. 502.

(*j*) Ont. Rules 271, 276.

(*k*) Ont. Rule 271; *Wright v. Morgan* (1877) 1 Ont. App. 613; *Cattanach v. Urquhart* (1873) 6 P.R. 28.

(*l*) *Wright v. Morgan* (1877) 1 Ont. App. 613.

Where the plaintiff company took a mortgage from a trustee and registered it without notice of any equitable right of the *cestui que trust*, the court considered it doubtful whether it was necessary for the plaintiffs to plead the provision of the Registry Act in order to take advantage of it (*m*).

Semble Registry Act need not be pleaded.

The defendants, assignees of a mortgage, sought to have embodied in the judgment an order for immediate payment under the covenant, and also an order for immediate possession, although these remedies were not asked for in the counter-claim. It was held that they were so entitled, the Rule requiring indorsement of these claims on the original writ not applying to a counter-claim (*n*).

Counter-claim by mortgagee.

The defendants in a mortgage action filed a counter-claim claiming damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises; an order was made striking out the counter-claim on the ground of inexpediency and inconvenience in trying the two causes of action together (*o*).

Counter-claim for slander of title.

vi. Dismissal before Judgment on Payment of Arrears.

In an action for foreclosure or sale, or for recovery of possession of any mortgaged property, for default in payment of interest or of an instalment of the principal, the defendant may before judgment move to dismiss the

Mortgage action may be dismissed on payment of arrears.

(*m*) *Building & Loan Association v. Poaps* (1896) 27 Ont. 470.

(*n*) *Klein v. Union Fire Ins. Co.* (1883) 3 Ont. 234; Ont. Jud. Act (1881) Rule 17; see present Ont. Rule 141.

(*o*) *Odell v. Bennett* (1889) 13 P.R. 10. See Rule 254:—Where a defendant sets up a counter-claim, if the plaintiff, or any other person named in manner hereinafter mentioned as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may, at any time before trial, apply to the Court or a Judge for an order that such counter-claim be excluded; and such order may be made as may seem just.

action upon paying into court the amount then due for principal, interest and costs (*p*).

But not where action on covenant only.

Defendant need not pay fractional part of instalment.

Mortgagor calling in principal bound by his election.

Where the plaintiff seeks to recover on the covenant the Rule does not apply, even although the whole of the mortgage money has become due by virtue of an acceleration clause (*q*). Nor does the Rule apply to proceedings under a power of sale (*r*).

Where a defendant moves to dismiss the action under this Rule he cannot be required to pay a fractional part of an instalment of interest; it is sufficient to pay the interest up to the last gale day (*s*).

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default in payment of any instalment of interest, if the plaintiff claims the benefit of the clause and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest and costs, whenever tendered, although he does not ask for a personal order for immediate payment (*t*).

It is doubtful whether the defendant in a foreclosure action who relies on a tender is obliged to pay the money into court (*u*).

vii. Judgment.

The mortgagor's right to redeem is a necessary incident to the mortgage, and the court will not grant an absolute judgment in the first instance foreclosing the mortgagor's

(*p*) Ont. Rule 388; based on R.S.O. (1877) c. 51, s. 71, which provided for payment of mortgage debt pending action of ejectment by mortgagor; 7 Geo. II, (1734) c. 20, s. 1. See *Ejectment Act* R.S. Man. (1891) c. 48; *Ejectment Act* New Bruns. Statutes (1894) c. 10; *Mortgagors' Relief Act*, R.S.B.C. (1897) c. 141.

(*q*) *Wilson v. Campbell* (1893) 15 P.R. 254.

(*r*) *Robertson v. Hetherington* (1888) 8 C.L.T. 141.

(*s*) *Strachan v. Murney* (1858) 6 Gr. 378.

(*t*) *Cruso v. Bond* (1881) 9 P.R. 111; 1 Ont. 384; overruling *Drummond v. Guickard* cited in *Green v. Adams* (1867) 2 Ch. Ch. 134.

(*u*) *Kinnaird v. Trollope* (No. 2) (1889) 42 Ch. D. 610.

equity of redemption, but will give the mortgagor an opportunity to find the money required to pay the mortgage debt.

Ontario Rule 596 is as follows:—

Judgment on
præcipe.

596. (1) Where the writ has been endorsed, as provided by Rule 141, and the defendant fails to appear, or by his statement of defence admits the execution of the mortgage and other facts, if any, entitling the plaintiff to a judgment, or where the defendant disclaims any interest in the mortgaged premises, or where no statement of defence is delivered, or where notice is filed and served disputing the amount of the plaintiff's claim only, or where in his appearance the defendant states that he disputes the amount of the plaintiff's claim only, the plaintiff may sign judgment, in which may be included, where claimed, any relief for which a claim may be indorsed upon the writ under Rule 141.

(2) The referee in such cases, when required, shall be to the Master in Ordinary, or a Local Master.

(3) Where the indorsement on the writ claims foreclosure, and the defendant files a notice requiring a sale and a certificate of the deposit of the sum of \$80, as required by Rule 381, the judgment shall be for sale, together with such other relief, if any, as the plaintiff is entitled to, upon the indorsement.

(4) Where in the defendant's appearance or otherwise a notice disputing the amount of the plaintiff's claim only is filed, the defendant filing the same shall be entitled to four days' notice of the taking of the account. Where no reference as to incumbrances is desired, such account may be taken by the officer signing judgment; and where a reference as to incumbrances is desired, then by the Master to whom the action is referred. The finding of the officer taking the account as to the amount due on signing judgment shall be subject to appeal to a Judge in Chambers in the manner prescribed by Rule 767, and such officer shall have power to direct a stay of proceedings until the time for appealing has expired.

(5) Where a reference as to incumbrances is directed, in a case where a notice disputing the amount of the plaintiff's claim has been filed, the judgment shall direct that the defendant filing such notice shall have four days' notice of the taking of the account.

(6) A judgment may be signed under this Rule, whether the defendant has been served personally or otherwise; but where the writ has not been personally served, the claim of the plaintiff shall be duly verified by affidavit, which shall be filed with the officer taking the account.

This rule in effect restores the former Chancery practice, the judgment now issued on *præcipe* being equivalent to the decree which would formerly have been made upon a hearing of the cause *pro confesso* (v). The *præcipe* judgment is applicable to simple cases only and the court will not grant extraordinary relief thereby. Thus where

Effect of
præcipe
judgment.

(v) *Kirkpatrick v. Howell* (1875) 22 Gr. 94.

the plaintiff claims an immediate order for absolute foreclosure, and the defendant fails to appear, the court will not grant this relief by judgment on *præcipe* (*w*). An interlocutory injunction granted to the plaintiff cannot be continued by a *præcipe* judgment (*x*).

Reference
as to in-
cumbrances.

The plaintiff may, or may not, take a reference to the Master as to incumbrances. If he takes a reference unnecessarily he will not be entitled to the costs of it (*y*). If the plaintiff fails to take a reference, and it is afterwards discovered that a subsequent incumbrance existed, he cannot obtain an interlocutory order to add parties in the Master's office, as the only reference authorized by the Rules is a reference by the judgment. But the court may amend the judgment so as to direct a reference in which case the former judgment and the proceedings under it will be treated as a nullity (*z*).

Immediate
judgment on
covenant.

Where the plaintiff in an action for foreclosure or sale claims immediate judgment on the covenant he may sign judgment in the same manner as if that relief alone were sought. The officer entering judgment computes the amount to which the plaintiff is entitled, and the judgment directs payment forthwith (*a*). Where the writ is issued from a local office the judgment must be entered in that office (*b*). A *præcipe* judgment may be varied or set aside on motion in chambers (*c*).

Judgment on
motion in
chambers
where
infants
interested.

Ontario Rule 595 provides as follows:—

595. In an ordinary action for redemption, foreclosure or sale where the defendants, or some of the defendants, are infants and no defence is set up, the action shall not be set down to be heard in court; but

(*w*) *Patey v. Flint* (1879) 48 L.J. Chy. 696.

(*x*) *King v. Freeman* (1867) 1 Chy. Ch. 350.

(*y*) *Purdy v. Parks* (1883) 9 P.R. 424.

(*z*) *Wilgress v. Crawford* (1888) 12 P.R. 658.

(*a*) Ont. Rules 141, 596. The English practice is to order payment within one month after the date of the Chief Clerk's certificate; *Farrer v. Lacey* (1883) 25 Ch. D. 636.

(*b*) *Chamberlain v. Armstrong* (1882) 9 P.R. 212; Ont. Rules 15, 628.

(*c*) *Trust & Loan Co. v. McCarthy* (1883) 19 C.L.J. 188; 3 C.L.J. 266.

after the statements of defence are filed, or after the time for filing the same has expired, the plaintiff, upon filing affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to judgment, may move for judgment in chambers, upon notice to the guardian *ad litem* of the infants and the other defendants' solicitor, if any.

Where infants are defendants, but an adult defendant is a lunatic or person of unsound mind, judgment cannot be pronounced in chambers, but the motion must be made in court (d).

In an action for foreclosure, where an infant is defendant, the judgment, as well as the final order of foreclosure, should name a day to show cause within six months after he shall come of age (e). Where the judgment is for sale a day to shew cause is not reserved. If the infant defendant, upon attaining the age of twenty-one does not within the time named show good cause to the contrary the judgment or order will be binding upon him (f).

Where the plaintiff seeks more than the ordinary relief and would otherwise be entitled to judgment on *praeceipe* he may move for judgment in court (g). On such motion, however, immediate foreclosure or other special relief will not be granted unless special grounds are shown, even although the defendant has failed to appear.

Where an adult defendant is a lunatic or person of unsound mind the motion for judgment must be made to the court (h).

In an action for foreclosure or sale where some of the defendants do not appear to the writ of summons, and

(d) *Warnock v. Prieur* (1887) 12 P.R. 264; Rule 609.

(e) *Mellor v. Porter* (1883) 25 Ch. D. 158; *London and Canadian L. & A. Co. v. Everitt* (1881) 8 P.R. 489; *Mair v. Kerr* (1851) 2 Gr. 223.

(f) As to what cause an infant may show see Seton on Decrees, 5th ed. 828 *et seq.* In Ontario it has been the practice for many years not to reserve a day to show cause. There is no reported decision authorizing this change from the former practice; but the reason for it would seem to be that the court considers the interests of the infant sufficiently protected by the appearance of the Official Guardian on behalf of the infant when the judgment is pronounced or the order made.

(g) Ont. Rule 609.

(h) *Warnock v. Prieur* (1887) 12 P.R. 264.

Day to show cause.

Judgment on motion to court.

Motion for judgment where some of the defendants do not appear.

Practice on motion to court.

Judgment for immediate foreclosure on sale.

others do appear against whom judgment cannot then be obtained, the pleadings may by analogy to Ontario Rule 263 be noted closed as against the former, and the action may be brought on for judgment against them without further notice to them (*i*).

Two clear days' notice of the motion must be given (*k*), and the motion must be set down in the Registrar's office at latest on the day before the day of argument (*l*). Where the motion is for judgment in default of delivery of statement of defence it is necessary upon setting down the motion to file in the Registrar's office (1) the writ of summons and affidavit of service thereof, and where service has been effected out of the jurisdiction, the order allowing service (*m*) ; (2) the statement of claim ; (3) an affidavit of non-appearance or that no statement of defence has been filed and served ; (4) a certificate of the state of the cause where the proceedings are in a local office.

The general rule of equity is that a period of six months is allowed to the mortgagor to redeem. But under special circumstances the court may on motion fix a time less than six months or may direct immediate foreclosure or sale.

(*i*) *Morse v. Lamb* (1892) 15 P.R. 9. Ontario Rule 263 is as follows: 263. Where any party makes default in delivering a statement of defence, or subsequent pleading, including pleadings in counter-claims, within the time limited therefor, in cases where interlocutory or final judgment cannot be signed, the opposite party may, at any time before the pleading is filed, upon proof of the default, by *præcipe* to the officer with whom the pleadings are filed, require him to note that the pleadings in the action are closed as to the party in default; and thereupon the officer shall enter such note in the pleadings book accordingly, and thereafter no pleading by the party in default shall be received or filed without the order of a judge.

But it would seem to be unnecessary now to take this course. See Ont. Rule 573:

573. Except where otherwise provided by these Rules or where otherwise ordered by the Court or a Judge, a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action.

(*k*) Ont. Rule 348.

(*l*) Ont. Rule 364.

(*m*) Ont. Rules 162, 164.

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Where it appeared that the mortgaged property was not worth the amount due to the plaintiff, and that it was for the benefit of the infant defendants, judgment for immediate foreclosure was granted (*n*).

Judgment for immediate sale without giving a day for redemption may be granted without the consent of the mortgagor (*o*), or without the consent of the subsequent incumbancers (*p*).

That the property is wholly unproductive (*q*), that the interest has been in arrears for many years (*r*), that the mortgaged estate is insufficient to realize the claim and is deteriorating (*s*), that for a special reason, for instance the building of railway in the vicinity of the lands, a favourable sale can be made (*t*), are special circumstances that will be considered by the court on an application for immediate sale. Where infants are concerned the application may be made in chambers (*u*), otherwise it should be made to a judge in court.

Ontario Rule 619 provides as follows:—

Form of
judgment.

619. Judgments for foreclosure or sale of mortgaged property where a reference is required, shall after the proper recitals hereto in use direct, in general terms, that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure (or for redemption or sale, as the case may be), and that for these purposes the cause is referred to (naming the Master); and a judgment so expressed shall be read and construed as if the same set forth the particulars contained in Rules 744 to 755 and Rule 385.

The Rules referred to in Rule 619 are as follows:—

744. Upon a reference under a judgment for foreclosure or sale or redemption of mortgaged property, the Master shall inquire and

(*n*) *Croxon v. Lever* (1863) 12 W.R. 237; *Bennett v. Harfoot* (1871) 19 W.R. 428; *Wolverhampton and Staffordshire Banking Co. v. George* (1883) 24 Ch. D. 707.

(*o*) *Foster v. Harvey* (1863) 4 DeG. J. & S. 59.

(*p*) *Township of Hamilton v. Stevenson* (1877) 25 Gr. 198. *Newman v. Selfe* (1864) 33 Beav. 522.

(*q*) *Foster v. Harvey* (1863) 4 DeG. J. & S. 59.

(*r*) *Newman v. Selfe* (1864) 33 Beav. 522.

(*s*) *Rigney v. Fuller* (1853) 4 Gr. 198.

(*t*) *Swift v. Minter* (1879) 27 Gr. 217.

(*u*) Ont. Rule 595.

state, whether any person, and who, other than the plaintiff, has any lien, charge, or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, subsequent thereto.

745. The plaintiff shall bring in to the Master's office certificates of the Registrar and Sheriff of the County wherein the property lies, setting forth all the incumbrances which affect the property in the writ or pleadings mentioned, and such other evidence as he may be advised.

746. The Master shall direct all such persons as appear to have any lien, charge or incumbrance upon the property in question, subsequent to the mortgage in question, to be made parties to the action, and to be served with a notice according to Form No. 77.

747. Any party served with a notice under Rule 746 may apply to the Court at any time within 14 days from the date of the service, to discharge, add to, vary, or set aside the judgment or order making him a party.

748. The Master, before he proceeds to hear and determine, shall require an appointment according to Form No. 78, to be served upon all persons made parties before the judgment or order.

749. Where a person who has been duly served with a notice under Rule 746 or with an appointment under Rule 748, neglects to attend at the time appointed, the Master shall treat such non-attendance as a disclaimer by the person so making default; and any claim of such person shall be thereby foreclosed, unless otherwise ordered upon application duly made for that purpose.

750. When all parties have been duly served, the Master shall take an account of what is due to the plaintiff, and to the other incumbrancers (if any), for principal money and interest, and tax their costs, and settle their priorities, and appoint a time and place, or times and places, for payment according to the practice of the Court.

751. On any proceeding for foreclosure by, or for redemption against an assignee of a mortgagee, the statement of the mortgage account, under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and an affidavit or oath shall not be required from the mortgagee or any intermediate assignee, denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account.

752. The Master's report shall state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided for, and the names of such as have made default, and shall set forth the amount of the claims, and priorities of such as have attended, and these latter shall be certified as the only incumbrances upon the property.

753. Subsequent accounts shall, from time to time, be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the judgment.

754. If the judgment directs a sale instead of foreclosure on default in payment, then on default being made, and an order for sale obtained, the property shall be sold, with the approbation of the Master, who shall settle the conveyance to the purchaser in case the parties differ about the same; and the purchaser shall pay his purchase money into Court, to the credit of the action, subject to further order.

755. The purchase money, when so paid, shall be applied in payment of what has been found due to the plaintiff and the other inceumbrancers (if any), according to their priorities, together with subsequent interest, and subsequent costs.

385. In default of payment according to the report in a foreclosure or redemption action, a final order of foreclosure may be granted against the party making default on an *ex parte* application.

In an action to foreclose an equitable mortgage by deposit of title deeds the judgment should declare that the plaintiff is entitled to a mortgage on the lands comprised in the deposit and agreement, or in the agreement where there is no deposit of title deeds, and should direct that in default of payment of the amount found due the defendant be foreclosed, and that he do convey the lands to the plaintiff free from all equity of redemption (v).

If the mortgagor is a married woman the judgment for foreclosure or sale will be in the usual form.

But where judgment is recovered against a married woman on a covenant by her in a mortgage deed the form of the judgment should be that the plaintiff do recover the debt and costs against the defendant, such sum and costs to be payable out of her separate property as thereafter mentioned, and not otherwise; and execution is to be limited to the separate property of the said defendant not subject to any restriction against anticipation, unless by reason of section 21 of *The Married Women's Property Act* (w) such property shall be liable to execution notwithstanding such restriction (x).

Form of
judgment
where mort-
gage equit-
able.

Judgment
against mar-
ried woman
for fore-
closure or
sale;
or on
covenant.

(v) *Lees v. Fisher* (1882) 22 Ch. D. 283, C.A.; Seton on Decrees, 5th ed. 1695.

(w) R.S.O. (1897) c. 163.

(x) *Scott v. Morley* (1887) 20 Q.B.D. 120; see *McMichael v. Wilkie* (1891) 18 Ont. App. 464 at p. 472.

Special provisions in judgment.

It may be necessary to insert special provisions in the judgment. Thus, where the defendants pleaded tender, the Master was directed to make enquiry on this point, and further directions and costs were reserved (*y*). And where the defendant pleaded payment in full the costs were reserved (*z*). Where the defendants were rival claimants to the equity of redemption it was referred to the Master to take the usual accounts and report, reserving the right to redeem to one of the defendants, with a proviso that if before the day appointed for payment the other defendant should establish his right to redeem, then he should redeem; and it was directed that the Master should not delay his report upon the account pending the enquiry (*a*).

Reference may be unnecessary.

Where there are no subsequent incumbrances the plaintiff will not require a reference; the account will be taken when judgment is entered. If the plaintiff takes a reference unnecessarily he will not be entitled to the costs of it (*b*). But if he fails to take a reference he cannot subsequently obtain an interlocutory order adding parties in the Master's office (*c*).

Entry of judgment.

When the action is commenced in a local office the judgment must be entered in that office (*d*).

Judgment for possession may be enforced by writ.

Where the plaintiff asks in the indorsement on the writ of summons or in the statement of claim for immediate delivery of possession, and recovers judgment therefor, he is entitled to delivery forthwith, and may enforce the judgment by writ of possession (*e*).

(*y*) *Peers v. Allen* (1872) 19 Gr. 98.

(*z*) *Gooderham v. DeGrassi* (1850) 2 Gr. 135.

(*a*) *Rumsey v. Thompson* (1860) 8 Gr. 372; *Robinson v. Dobson* (1865) 11 Gr. 357; *Cayley v. Hodgson* (1867) 13 Gr. 433.

(*b*) *Purdy v. Parks* (1883) 9 P.R. 424.

(*c*) *Wilgress v. Crawford* (1888) 12 P.R. 658.

(*d*) Ont. Rule 635.

(*e*) Ont. Rule 846.

viii. *Proceedings in Master's Office.*

The scope of the Master's authority is thus discussed Powers of
Master. by the Supreme Court in *Bickford v. Grand Junction Ry. Co.* (f):—

"The general practice of the Court of Chancery of Ontario is that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings and adjudicated on by the court at the hearing of the cause. If the mortgagors are to be at liberty to say in the Master's office that there is nothing due on the mortgage deed because it was beyond the power of the corporation to make it, why should they not also be heard to say there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to inquire into the validity of the deed would be co-extensive with that of the court at the hearing, embracing every case in which a mortgage might be impeached upon a ground which would have entitled the mortgagor to have had it wholly set aside by decree, or to have had the mortgagée's bill for foreclosure dismissed. We know of no authority for any such delegation of the functions of the court to the Master."

Ontario Rule 667 provides as follows :—

Powers of
Master on
reference.

667. Under a judgment or order of reference, the Master shall have power:

- (a) To take the accounts with rents or otherwise;
- (b) To take account of rents and profits received or which, but for wilful neglect or default, might have been received;
- (c) To set occupation rent;
- (d) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;
- (e) To make all just allowances;
- (f) To report special circumstances;
- (g) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred.

Before the reference is proceeded with an appointment in the prescribed form must be served upon all persons made parties before the judgment or order (g).

Original
parties to be
served with
appointment.

If an original defendant has not entered an appearance to the action service of the appointment upon him may be effected by posting up a copy in the office in which

(f) (1877) 1 S.C.R. 696, at p. 725.

(g) Ont. Rule 748.

the proceedings are being conducted. Where several defendants have failed to appear a copy should be posted up for each one (*h*).

Service of appointment where defendant out of the jurisdiction.

Where in an action in Ontario for redemption or sale parties living out of the jurisdiction were personally served with the writ of summons and statement of claim and did not appear, it was held that the practice should be regulated by analogy to Ontario Rule 467 then in force (*i*); and it appearing that other parties in the same interest as the absent defendants would be represented in the Master's office an order was made dispensing with service on the absent defendants of the warrant and other proceedings in the Master's office (*k*).

Service of notice on added parties

The Master shall direct all persons who appear to have any lien, charge or incumbrance on the property in question, subsequent to the mortgage, to be made parties, and to be served with notice (*l*).

Party added in Master's office may apply to discharge judgment on order.

Any party served with notice may apply to the court at its weekly sittings, within fourteen days after service of the notice, to discharge, add to, vary or set aside the judgment or order making him a party (*m*).

If a person added in the Master's office as a subsequent incumbrancer claims to be prior to the plaintiff he may either move to set aside the judgment or order, or after the Master's report is made he may appeal therefrom.

(*h*) Ont. Rule 330.

(*i*) Now Ont. Rule 334:—Where it appears upon the hearing of any matter that by reason of absence, or for any other sufficient cause, the service of notice of the application or of the appointment cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice by advertisement or otherwise may be ordered. See Ont. Rule 3.

(*k*) *Smith v. Houston* (1892) 15 P.R. 18.

(*l*) Ont. Rule 746.

(*m*) Ont. Rule 747. See Holmested and Langton's Ont. Jud. Act, 2nd ed. 913.

But it would seem to be the better practice to move against the judgment or order (*n*).

If parties added in the Master's office submit to the judgment or order and do not move against it, they cannot in the Master's office attack the mortgage for fraud or as being *ultra vires* (*o*). But there is no necessity and no right on the part of subsequent incumbrancers added in the Master's office to alter or vary the judgment for the purpose of questioning and reducing the amount of a charge fixed as between the plaintiff and defendant, it being open to the added parties in the absence of notice of the charge to raise the question of its value in the Master's office (*p*).

Where a person has been duly served with a notice or an appointment and neglects to attend at the time appointed, the Master shall treat such non-attendance as a disclaimer, and the claim of such person shall be thereby foreclosed unless otherwise ordered (*q*).

But notwithstanding such foreclosure the subsequent incumbrancer will in some cases be allowed to come in and prove his claim. Thus an incumbrancer who had been foreclosed by the Master's report was admitted to prove his claim on explaining his neglect to come in and undertaking to rank after a *puisne* incumbrancer who had already proved his claim (*r*). In one case a subsequent mortgagee who also held a mortgage on other property of the mortgagor was allowed in after report, on payment of costs, to consolidate his claim and prove on the other mortgage (*s*). The application for leave to be let in should

Mortgage deed cannot be attacked in Master's office.

Party not attending to be treated as disclaiming.

Incumbrancer may be let in after foreclosure.

(*n*) *McDonald v. Rodger* (1862) 9 Gr. 75; see *Montgomery v. Shortis* (1870) 3 Ch. 69; *Crawford v. Meldrum* (1872) 19 Gr. 165; *Reinhart v. Shutl* (1888) 15 Ont. 325.

(*o*) *McDougall v. Lindsay Paper Mill Co.* (1884) 10 P.R. 247.

(*p*) *Rutherford v. Rutherford* (1896) 17 P.R. 228.

(*q*) Ont. Rule 749.

(*r*) *Becher v. Webb* (1879) 7 P.R. 445.

(*s*) *Ross v. Stevenson* (1877) 7 P.R. 126; see *Sterling v. Campbell* (1862) 1 Ch. 147; *Cameron v. Wolfe Island Co.* (1873) 6 P.R. 91.

be made to the Master unless he has made his general report, in which case he is *functus officio* and the application must then be made in chambers.

Taking the account.

When all parties are duly served the Master shall take an account of what is due the plaintiff and the other incumbrancers, if any, for principal, interest and costs, shall settle priorities, and appoint a time and place for payment (*t*).

Proof of mortgage account.

The claim of an incumbrancer is *prima facie* proven in the Master's office by the production of the mortgage deed, and the filing of an affidavit verifying the incumbrancer's claim and stating the amount due him for moneys advanced by him to the mortgagor and secured by the mortgage; and the onus of reducing the amount rests on the plaintiff (*u*).

Where the plaintiff proved his mortgage deed and it appeared therein that certain instalments of interest were overdue, it was held that the plaintiff had made out a *prima facie* case and could not be called on to prove non-payment of the interest; and that the onus of proving payment lay on the defendant (*v*).

Where the bill was taken *pro confesso* against the mortgagor the plaintiff was required to show how the money was advanced and not merely what remained due (*w*).

Proof of mortgage account by assignee of mortgage.

Where the action for foreclosure is by an assignee of the mortgagee, the state of the mortgage account may be proved *prima facie* by the oath of the assignee, and it shall not be necessary to prove by the affidavit or oath of the mortgagee or any intermediate assignee that payment has not been made to such mortgagee or intermediate assignee, unless the mortgagor or his assignee or the party

(*t*) Ont. Rule 750.

(*u*) *Court v. Holland* (1880) 8 P.R. 213; *Warren v. Taylor* (1862) 9 Gr. 59; *Elliott v. Hunter* (1876) 24 Gr. 430.

(*v*) *Markle v. Ross* (1889) 13 P.R. 135.

(*w*) *Sterling v. Riley* (1862) 9 Gr. 343.

proceeding to redeem denies on oath the correctness of such statement of account (*x*).

The mortgagor is at liberty to shew in the Master's office what sum was really advanced on the mortgage (*y*). But if the mortgagee is dead the evidence must be clear in order to reduce the amount below the amount appearing on the face of the mortgage (*z*).

The parties may shew that the mortgage was in reality made for some purpose other than that apparent on its face, for example, that it was given as collateral security for a promissory note (*a*).

Where the judgment in a foreclosure action by a first mortgagee against subsequent incumbrancers and the mortgagor appoints successive days for redemption, and foreclosure in default of redemption, the first subsequent incumbrancer, in default of payment by the day named for redemption by him, will be foreclosed, or if he redeems the first mortgagee he may then be redeemed by the incumbrancer immediately subsequent to himself. In either case it will be necessary for the Master to take a subsequent account for the purpose of ascertaining the amount required to redeem the first subsequent incumbrancer, if he has redeemed the first mortgagee, or to redeem the first mortgagee if the first subsequent incumbrancer has been foreclosed. This process continues until the person entitled to the ultimate equity of redemption is reached.

Subsequent accounts may be taken, subsequent costs taxed and other necessary proceedings had for redemption by, or foreclosure of the other parties entitled to redeem,

(*x*) Ont. Rule 751.

(*y*) *Penn v. Lockwood* (1850) 1 Gr. 547. See *Brownlee v. Cunningham* (1867) 13 Gr. 586; *Morrison v. Robinson* (1872) 19 Gr. 480.

(*z*) *Fraser v. Lolie* (1863) 10 Gr. 207.

(*a*) *McIntyre v. Thompson* (1884) 6 Ont. 710; 19 C.L.J. 393; *Brownlee v. Cunningham* (1867) 13 Gr. 586; *Morrison v. Robinson* (1872) 19 Gr. 480.

Mortgagor
may show
amount
actually
advanced.

Parties may
show real
purpose of
mortgage.

Subsequent
accounts.

as if specific directions for these purposes had been contained in the judgment (b).

Compound interest not allowed on taking subsequent account.

The practice of the court in England on taking the subsequent account is to require the person next entitled to redeem to pay subsequent interest on the whole amount found due by the last report for principal, interest and costs, as one accumulated consolidated sum (c). But it is not the practice in Ontario to allow compound interest unless it is expressly stipulated for in the mortgage deed (d).

Insurance premium allowed in subsequent account.

Where the plaintiff after the taking of the account paid a sum for insurance under a provision in the mortgage deed, the Master in taking a subsequent account allowed the sum together with interest thereon (e).

Sale at request of subsequent incumbrancer.

In a foreclosure action, if a subsequent incumbrancer made a party in the Master's office desires a sale he shall deposit in court \$80 before the Master's report is settled, whereupon an order may be issued on *præcipe* directing a sale instead of foreclosure (f).

Deposit required.

Former Chancery Order 429 required the deposit of "a reasonable sum." It would seem that under the present rule the amount cannot be increased even although the costs of the sale exceed \$80. But where a subsequent incumbrancer claims a sale the plaintiff may require him to conduct it (g).

Court may extend time for payment.

When the mortgagor makes default in payment by the day fixed for redemption, the mortgagee is entitled to a final order of foreclosure. But the court regarding the mortgage merely as a security will in some cases, even after such default, give the mortgagor further time to pay

(b) Ont. Rule 753.

(c) *Elton v. Curteis* (1881) 19 Ch. D. 49.

(d) See Holmested & Langton's Ont. Jud. Act, 2nd ed. 933.

(e) *Bethune v. Calcutt* (1853) 3 Gr. 648.

(f) Ont. Rule 382.

(g) Ont. Rule 383.

the mortgage debt. This relief, however, will not be afforded as an indulgence to the mortgagor if there is no reasonable excuse for the default or where the security is insufficient (*h*).

Where the mortgagor was prevented from selling the property by reason of an improper advertisement published by the mortgagee's solicitors, six months further time was given, and costs were refused to the mortgagee (*i*). Where the mortgage was for purchase money, and the vendor had failed to pay off a prior mortgage which he had covenanted to pay, and the defendant was prevented by the existence of the prior mortgage from raising money to pay off the second mortgage, the time was extended (*j*). On an application made before the day fixed for payment it was shown that the value of the mortgaged property would be greatly enhanced by the construction of a contemplated railway, and the time for redemption was extended for six months (*k*).

If the indulgence is granted to the mortgagor, it is usually only on the terms of his paying the arrears of interest and costs by the time originally fixed for redemption, or within a short time thereafter (*l*). Where the mortgagor made default and the mortgagee was in consequence compelled to borrow money to meet his liabilities at a rate of interest higher than that reserved by the mortgage, the

Terms upon
which
extension of
time may be
granted.

(*h*) *Nanny v. Edwards* (1827) 4 Russ. 124; *Jones v. Creswicke* (1839) 9 Sim. 304; *Eyre v. Hanson* (1840) 2 Beav. 478; *Patch v. Ward* (1867) 3 Ch. 203, 212.

(*i*) *Gilmour v. Myers* (1868) 2 Chy. Ch. 179.

(*j*) *G. v. V.* (1867) 2 Chy. Ch. 33.

(*k*) *Cameron v. Cameron* (1869) 2 Chy. Ch. 375. See *Ford v. Steeples* (1844) 1 U.C. Jur. pt. 1, 282; *Street v. O'Reilly* (1868) 2 Chy. Ch. 270; *Cahuae v. Durie* (1869) 2 Chy. Ch. 394.

(*l*) *Street v. O'Reilly* (1868) 2 Chy. Ch. 270; *Cahuae v. Durie* (1869) 2 Chy. Ch. 394; *Cameron v. Cameron* (1869) 2 Chy. Ch. 375; *Canada Permanent Loan & Savings Co. v. Donaldson* (1893) Man. 30 C.L.J. 68; *Monkhouse v. Corporation of Bedford* (1810) 17 Ves. 380; *Edwards v. Cunliffe* (1816) 1 Madd. 287; *Whatton v. Cradock* (1836) 1 Kee. 267; *Brewin v. Austin* (1838) 2 Kee. 211; *Eyre v. Hanson* (1840) 2 Beav. 478; *Geldard v. Hornby* (1841) 1 Ha. 251; *Coombe v. Stewart* (1851) 13 Beav. 111.

Extension pending appeal.

Fixing day for redemption.

(a) In actions for foreclosure.

Where conflicting claims to priority one period allowed.

time was extended upon the terms of the mortgagor paying a sum sufficient to cover the excess of interest that the mortgagee was required to pay (*m*). Where the mortgagee receives rents of the mortgaged lands between the date of the Master's report and the time fixed for payment, the mortgagor is entitled, unless under special circumstances (*n*), to an enlargement of the time (*o*). The time may be enlarged pending an appeal (*p*). The application to extend the time may be made in chambers (*q*).

The Master appoints a day for redemption. If he omits to do so, an order appointing a day may be obtained in chambers (*r*).

The practice in foreclosure actions is to allow six months to the persons first entitled to redeem. The tendency of the court is to give one period for redemption, and not to allow successive opportunities to redeem. But the persons who have a subsequent right of redemption may according to priority be allowed further periods to redeem (*s*).

Where, however, there are conflicting claims as to priority among several subsequent incumbrancers, one day only will be allowed to all the defendants without prejudice to their priorities *inter se* (*t*).

(*m*) *Howard v. Macara* (1859) 1 Chy. Ch. 27.

(*n*) *Coleman v. Llewellyn* (1886) 34 Ch. D. 143, C.A.; *Welch v. National Cycle Works* (1886) 55 L.T. 673.

(*o*) *Garlick v. Jackson* (1841) 4 Beav. 154; *Alden v. Foster* (1842) 5 Beav. 592; *Ellis v. Griffiths* (1844) 7 Beav. 83; *Buchanan v. Greenway* (1849) 12 Beav. 355; *Patch v. Ward* (1867) 3 Ch. 203; *Allen v. Edwards* (1873) 42 L.J. Ch. 455.

(*p*) *Finch v. Shaw* (1855) 20 Beav. 555; *Bank of Upper Canada v. Pottroff* (1862) 8 U.C.L.J. (O.S.) 328.

(*q*) *Anon* (1853) 4 Gr. 61.

(*r*) *King v. Connor* (1863) 10 Gr. 364.

(*s*) *Smithett v. Hesketh* (1890) 44 Ch. D. 161. In Manitoba it was held that only one period of six months should be allowed for redemption to the mortgagor and subsequent incumbrancers, the English practice being followed in preference to that of the Ontario courts: *Rice v. Murray* (1884) 2 Man. R. 37.

(*t*) *Bartlett v. Rees* (1871) L.R. 12 Eq. 395; *Platt v. Mendel* (1884) 27 Ch. D. 246; *Smithett v. Hesketh* (1890) 44 Ch. D. 161; *Western Canada Loan & Savings Co. v. Heimrod* (1892) 28 C.L.J. 185.

The mortgagor is not entitled to more than one period of six months for redemption, and successive periods will not as a rule be granted at his request, although they may be granted at the request of subsequent incumbrancers.

Mortgagor entitled to one period only.

In *Platt v. Mendel* (*u*) Chitty, J. said :—

"It is an anomaly to say that the mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem."

Where portions of the mortgaged lands are conveyed away by the mortgagor, only one day for payment will be given to all the persons interested in the equity of redemption (*v*).

Where several purchasers one period only allowed to them.

Where a mortgage provides that in case of sale the mortgagee on receipt or tender of a certain proportion of the purchase money shall release the part sold from the mortgage, each purchaser is entitled to redeem his own part, on payment of the stipulated proportion of the money, and the Master should appoint one day for each of the several purchasers to redeem his respective portion (*w*).

Several purchasers with right to redeem their respective parts.

A subsequent incumbrancer and all persons claiming under him are entitled to but one period of redemption (*x*).

Subsequent incumbrancer and persons claiming under him.

Where there are several judgment creditors made parties in the Master's office, they will be allowed only one period for redemption, otherwise the foreclosure suit might continue for years (*y*).

Formerly, where successive redemptions were directed, the practice was to allow three months from the taking of each successive account. But it is now provided that when it becomes necessary to fix a date for redemption

Further period, if allowed, one month.

(*u*) (1884) 27 Ch. D. 246.

(*v*) *Hill v. Forsyth* (1859) 7 Gr. 461.

(*w*) *Davis v. White* (1869) 16 Gr. 312.

(*x*) *Loveday v. Chapman* (1875) 32 L.T. 689; *Beevor v. Luck* (1867) L.R. 4 Eq. 537.

(*y*) *Bates v. Hillcoat* (1852) 16 Beav. 139; *Ardagh v. Wilson* (1867) 1 Chy. Ch. 389; but see *Carroll v. Hopkins* (1854) 4 Gr. 431.

after the lapse of the first period of six months, the further time allowed shall be one month (*z*).

(*b*) Fixing day for redemption in action for sale.

Master's report.

Preparing report.

Report where infant entitled to money in court.

Contents of report.

Where the judgment for sale does not shorten the period of redemption, the Master fixes one day six calendar months from the day of the report for the mortgagor to redeem the plaintiff and all subsequent incumbrancers who have proved claims in the Master's office. If the mortgagor fails to redeem a final order for sale may be obtained (*a*).

As to the meaning of the terms "report" and "certificate" of a Master it has been said:—

"Though we apply the term "report" to the more lengthened productions of a Master, and the term "certificate" to his shorter statements, it is, I think, clear that all his reports are certificates, and all his certificates are reports" (*b*).

The certificate of a Master as to any matter arising upon a reference is a report upon the matter and subject to the same rules as an ordinary report (*c*).

As soon as the hearing is concluded the Master shall so inform the parties attending on the reference, and shall make a note to that effect in his book. He shall then proceed to prepare his report and shall cause a warrant to settle to be served on the parties (*d*).

Ontario Rule 696 is as follows:—

696. Where, by a report, any money in court is found to belong to infants, the Master shall require proper evidence of the age of the infants to be given before him, and shall in his report state the date of birth and age at the time of his report of each of such infants or shall certify specially his reason for not so doing.

And Ontario Rule 752 is as follows:—

752. The Master's report shall state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided for, and the names of such as have made default, and shall set forth the amount of the claims, and priorities of such as have attended, and these latter shall be certified as the only incumbrances upon the property.

(*z*) Ont. Rule 393.

(*a*) Ont. Rule 754.

(*b*) *Chennel v. Martin* (1833) 4 Sim. 340, per Shadwell, V.-C.

(*c*) *Re Molphy, Beckes v. Tiernan* (1896) 17 P.R. 247.

(*d*) Ont. Rule 687.

An application to let in further evidence may be made to the Master at any time before he signs the report (e). After the report is signed, the Master is *functus officio*, and the application must be made to the court (f). And after signing the report the Master should not certify further as to any matters that were before him on the reference, unless required by the court to do so (g).

Master may let in further evidence before signing report.

As soon as the report is prepared it shall be delivered out to the party prosecuting the reference, and if he declines to take it then it may be delivered, in the discretion of the Master, to any other party applying therefor (h). The Filing report report is to be filed in the office in which the proceedings were commenced (i) and notice of filing must be given forthwith by the party filing it (j).

Delivery out of report.

Ontario Rule 769 is as follows:—

Report when absolute.

769. Every report or certificate of a Master shall be filed and shall become absolute at the expiration of fourteen days from the date of serving of notice of filing the same unless notice of appeal is served within that time.

If all parties interested in the report consent, but not otherwise, an order may be obtained in chambers confirming the report before the expiration of the fourteen days (k).

Immediate confirmation of report.

ix. *Appeal from Master's Report.*

The report must be filed before notice of appeal therefrom is served (l).

Filing report

- (e) *Re Ritchie, Sewery v. Ritchie* (1876) 23 Gr. 66.
- (f) *O'Donohue v. Hembroff* (1873) 9 U.C.L.J. 312.
- (g) *Rosebatch v. Parry* (1879) 27 Gr. 193.
- (h) Ont. Rule 691.
- (i) Ont. Rule 693.
- (j) Ont. Rule 694.
- (k) *Patterson v. Gilbert* (1888) 12 P.R. 652.
- (l) *Hayes v. Hayes* (1881) 8 P.R. 546.

No written objections or exceptions need be taken before the Master previously to an appeal (*m*).

On the appeal no point can be raised that was not raised on the reference (*n*).

Notice of appeal from a Master's report must be given within fourteen days from the date of serving notice of filing the report (*o*). But the court or a judge may enlarge the time appointed by any Rule for taking any proceeding; and the enlargement may be granted after the expiration of the time appointed (*p*). In *Re Manchester Economic B.S.* (*q*) Brett, M.R. said:—

"I know of no rule other than this, that the court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given (*r*)."

The applicant must account for the delay, and must shew by affidavit reasonable and probable grounds for the appeal (*s*). Where the report has become absolute and a judgment on further directions founded thereon has been pronounced, drawn up and entered, an application for leave to appeal cannot be entertained (*t*).

The application for leave to appeal after confirmation of the report may be made in chambers, and must be on notice (*u*). It may be made to the Master in Chambers (*v*).

(*m*) Ont. Rule 692.

(*n*) Ont. Rule 688.

(*o*) Ont. Rule 769.

(*p*) Ont. Rule 353.

(*q*) (1883) 24 Ch. D. 488.

(*r*) See *Sievwright v. Leys* (1882) 9 P.R. 200; *Langdon v. Robertson* (1887) 12 P.R. 139; *Re Gabourie, Casey v. Gabourie* (1887) 12 P.R. 252.

(*s*) *Dudley v. Berczy* (1870) 3 Chy. Ch. 81; *Chard v. Meyers* (1870) 3 Chy. Ch. 120; *Dickson v. Avery* (1871) 3 Chy. Ch. 222; *Caisse v. Burnham* (1874) 6 P.R. 201.

(*t*) *Re Dingman and Hall* (1889) 13 P.R. 232.

(*u*) *Hamilton v. Tweed* (1883) 9 P.R. 448.

(*v*) *Sievwright v. Leys* (1882) 9 P.R. 200.

An appeal lies from the Master in the Ordinary to the Divisional Court, except as to decisions or rulings upon questions of practice or in his jurisdiction in chambers (*w*).

Appeal from
Master-in-
Ordinary :
(1) Appeal
from sub-
stantive
report.

The appellant must give seven clear days' notice, setting out the grounds of appeal, returnable at the first sittings of the Divisional Court for which due notice can be given after the expiration of fourteen days from the service of notice of filing of the report or certificate (*x*). The appeal shall be set down two clear days before the sittings of the Divisional Court for which the notice is given (*y*).

Where the appeal is from a judgment, order or decision of the Master in Ordinary, made or given under his jurisdiction in chambers (*z*), it lies to a judge in chambers (*a*).

(2) Appeal
from Master-
in-Ordinary
exercising
jurisdiction
in chambers.

Notice must be served within four days and be returnable within ten days after the decision complained of (*b*).

(3) Appeal
from Master-
in-Ordinary
not in
chambers, on
question of
practice.

Where the report or certificate appealed from is a report or certificate of a ruling upon a question of practice not made in the exercise of the Master in Ordinary's jurisdiction in chambers, an appeal lies to a judge in court (*c*). This would seem to be the proper interpretation of Ontario Rule 771, for although it appears to include all appeals from the Master in Ordinary that do not lie to the Divisional Court, yet appeals from his rulings when exercising his jurisdiction in chambers are regulated by Rule 767 and, therefore, do not come under this Rule.

The appellant must give seven clear days' notice, setting out the grounds of appeal, and returnable within one month from the date of service of the notice of filing of the

(*w*) Ont. Jud. Act, R.S.O. (1897) c. 51, s. 75, sub-s. 2.

(*x*) Ont. Rule 770 sub-s. 1.

(*y*) Ont. Rule 770 sub-s. 2.

(*z*) Ont. Rule 698, sub-s. 1:—The Master in Ordinary shall have the same power, authority and jurisdiction as the Master in Chambers, in respect of all causes and matters referred to him, or which may arise in his office.

(*a*) Ont. Rule 767, sub-s. 1.

(*b*) Ont. Rule 767, sub-s. 3.

(*c*) Ont. Rule 771, sub-s. 1.

report or certificate. The appeal must be set down at latest on the day before the day on which the motion is returnable (d).

**Appeal from
Local Master**

An appeal from the report of a Local Master is to a judge in court on seven clear days' notice, setting out the grounds of appeal, and returnable within one month from service of notice of filing report. The appeal is to be set down at latest on the day before the return day of the motion (e).

**Appeal from
judge in
court.**

An appeal lies to the Divisional Court or to the Court of Appeal from the judgment or order of a judge in court upon an appeal from the report or certificate of a Master (f).

**When appeal
from
Master's
report may
be brought.**

An appeal will lie from the Master's ruling as to admissibility of evidence (g), or from a ruling disallowing a creditor's claim (h), or as to the principle upon which an account should be taken (i).

Where the witnesses have been before the Master the court will not as a general rule interfere with his decision based upon the weight of evidence and the credibility of witnesses (j). If the witnesses have not been before the Master the court is in as good a position as the Master to judge of the evidence (k).

No alteration should be made on the appeal in the amount found due by the Master when such amount has not been appealed against (l).

**Reference
back.**

The court may refer the report back to the Master. Where the Master is directed to ascertain a particular fact

(d) Ont. Rule 771.

(e) Ont. Rule 771.

(f) Rule 772.

(g) *McDonald v. Wright* (1866) 12 Gr. 552.

(h) *Wood v. Brett* (1862) 9 Gr. 452.

(i) *Court v. Holland* (1881) 29 Gr. 19.

(j) *Coldwell v. Hall* (1862) 9 Gr. 110; *Waddell v. Smyth* (1871) 3 Chy. Ch. 412; *McArthur v. Prittie* (1881) 29 Gr. 500.

(k) *Fawcett v. Burwell* (1880) 27 Gr. 445.

(l) *Gordon v. Gordon* (1886) 12 Ont. 593.

on the reference back, he cannot open other matters included in his report not objected to on the appeal (*m*). Nor can the Master on a reference back entertain a new claim unless ordered to do so (*n*).

x. Stay of Proceedings after Judgment.

After judgment, but before sale or final foreclosure or recovery of possession of the mortgaged property, the defendant may move to stay the proceedings upon paying into court the amount then due for principal, interest and costs (*o*). After payment under this Rule of the instalments in arrear, it is irregular for the plaintiff to take further proceedings until another instalment falls due (*p*).

Stay upon payment of arrears.

Where an application is made to stay proceedings under this Rule, the judgment may afterwards be enforced by order of the court upon subsequent default in payment of a further instalment of the principal, or of the interest (*q*).

Subsequent default.

The defendant is not entitled to relief under the Rule when the action is on the covenant and the whole of the mortgage money has become due by virtue of an acceleration clause (*r*).

xi. Sale Proceedings in Master's Office.

Where the judgment is for redemption or sale, then in default of payment by the time limited for redemption a final order for sale may be obtained in chambers (*s*). And when the judgment is for foreclosure, a subsequent incumbrancer added in the Master's office may, after judgment

Order for sale.

- (*m*) *Williams v. Haun* (1864) 10 Gr. 553.
- (*n*) *Romanes v. Herns* (1875) 22 Gr. 469.
- (*o*) Ont. Rule 389.
- (*p*) *Carroll v. Hopkins* (1854) 4 Gr. 431.
- (*q*) Ont. Rule 390.
- (*r*) *Wilson v. Campbell* (1893) 15 P.R. 254.
- (*s*) Ont. Rule 754.

and before the Master's report is settled, obtain on *præcipe* an order for sale instead of foreclosure (*t*).

Mode of sale. The Master may cause the property, or a competent part thereof, to be sold, either by public auction, private contract or tender; or part by one mode and part by another, as he may think best for the interest of all parties (*u*).

Conduct of sale.

Usually the plaintiff has the carriage of the judgment or order and therefore the conduct of the sale. But the conduct may be given to a defendant (*v*). If the parties wish to bid, the proper course, it would seem, is to direct the sale to be conducted by some solicitor not concerned for any of the parties (*w*).

Proceedings in Master's office.

The solicitor for the party having the conduct of the sale shall take a warrant or appointment from the Master and serve it upon all necessary parties (*x*).

Advertisement.

At the time appointed he shall bring into the Master's office a draft advertisement (*y*), which must contain the following particulars:—

- (1) The short style of cause;
- (2) That the sale is in pursuance of a judgment or order of the court;
- (3) The time and place of sale;
- (4) A short and true description of the property to be sold;
- (5) The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots;
- (6) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times,

(*t*) Ont. Rule 382.

(*u*) Ont. Rule 716.

(*v*) *Hewitt v. Nanson* (1858) 7 W.R. 5.

(*w*) *Ramsay v. McDonald* (1880) 8 P.R. 283.

(*x*) Ont. Rule 719.

(*y*) Ont. Rule 720.

and whether the residue of such purchase money is to be paid with, or without interest ;

(7) Any particulars, in which the proposed conditions of sale differ from the standing conditions (*z*).

If a party has any objection to the advertisement as framed the objection should be taken on the settling of the advertisement, or before the sale takes place. The omission of a material fact from or a material misdescription in the advertisement may be ground for relieving the purchaser from the purchase or may entitle him to compensation (*a*).

At the time appointed by the Master's warrant or appointment the Master shall Arrangements for sale.

- (1) Settle the advertisement ;
- (2) Fix the time and place of sale ;
- (3) Name the auctioneer where one is employed ;
- (4) Fix an upset price or reserved bidding ;
- (5) And make every other necessary arrangement for the sale (*b*).

The advertisement shall be inserted at such times and in such manner as the Master may appoint (*c*).

All parties may bid without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents or other persons in a fiduciary position ; and where any parties are at liberty to bid, it shall be so notified in the conditions of sale (*d*). Right of parties to bid.

As a general rule the party having the conduct of the sale will not be allowed to bid, but the conduct may be transferred to another party ; and if all parties desire to bid, it would seem that they may do so if the conduct is

(*z*) Ont. Rule 721.

(*a*) See Holmested and Langton's Ont. Jud. Act, 2nd ed. 881 and cases there cited.

(*b*) Ont. Rules 722, 724.

(*c*) Ont. Rule 726.

(*d*) Ont. Rule 725.

transferred to a solicitor not concerned for any of the parties (e).

An order for leave to bid may be obtained in chambers. When the sale proceedings are in the office of the Master in Ordinary he may make the order by virtue of his jurisdiction in chambers (f).

Agreement
to purchase.

If the property is sold a written agreement shall be signed by the purchaser at the time of sale. The deposit shall be paid to the vendor or his solicitor at the time of sale and shall forthwith be paid into court in the name of the purchaser (g).

Affidavit of
auctioneer.

After the sale is concluded the auctioneer shall make an affidavit as to the result (h) and the Master shall prepare a report on the sale (i).

Motion to
set aside
sale.

If any party objects to the sale he may move in chambers to set it aside (j). The motion should be made before the report is confirmed.

Payment of
purchase
money into
court.

After the confirmation of the report the purchaser may pay his purchase money into court (k), and may have a reference as to title (l).

Settlement
of convey-
ances.

The Master shall settle all necessary conveyances in case the parties differ, or in case there are any persons under disability interested in the sale (m).

(e) *Ramsay v. McDonald* (1880) 8 P.R. 283; see *Taylor v. Sharp* (1885) 3 Man. R. 4. In *Halsted v. Conklin* (1885) 3 Man. R. 8, leave was granted to the plaintiff to bid all parties consenting thereto, but the court remarked that it was objectionable that the party conducting the sale should be a bidder.

(f) Ont. Rule 698.

(g) Ont. Rules 728, 729. As to mode of paying money into court see Ont. Rule 405 *et seq.*

(h) Ont. Rule 730.

(i) Ont. Rules 730, 731.

(j) Ont. Rule 732.

(k) Ont. Rule 733.

(l) Ont. Rule 735.

(m) Ont. Rule 734. In every case in which the court has authority to order the execution of a conveyance of property, a vesting order may be granted which shall have the same effect as a conveyance: Ont. Jud. Act, R.S.O. (1897) c. 51, s. 36.

Ontario Rule 386 provides as follows:—

386. If the purchase money is insufficient to pay what has been found due to the plaintiff for principal, interest and costs, subsequent interest, and subsequent costs in an action for sale, the plaintiff (where the mortgagor or person liable to pay the debt is a defendant, and such relief is claimed) shall be entitled, on an *ex parte* application to the court or a judge, to an order for the payment of the deficiency.

Order for payment of deficiency after sale.

xii. Final Order of Foreclosure.

If the judgment is for sale and the sale proves abortive, a final order of foreclosure may be obtained on motion in chambers (*n*). The court may in such a case allow further time to redeem; if time is allowed one month would appear to be proper (*o*). The special circumstances of the case should be taken into consideration in deciding whether the further period for redemption should be long or short (*p*).

Final order of foreclosure after abortive sale.

Where in a foreclosure action default is made in payment by the time fixed for redemption, a final order of foreclosure may be granted against the party making default on an *ex parte* application (*q*). The final order is necessary to complete the foreclosure: a judgment of foreclosure without final order is not a good defence to an action to redeem (*r*).

Final order on *ex parte* application;

A mortgagee whose title has not been perfected by foreclosure or otherwise is not entitled to an order for partition or sale under Ontario Rule 956 (*s*).

The final order is generally granted on an *ex parte* application but in some cases notice of the motion will be

but notice may be required.

(*n*) *Goodall v. Burrows* (1859) 7 Gr. 449; *Odell v. Doty* (1868) 1 Chy. Ch. 207; *Girdlestone v. Gunn* (1868) 1 Chy. Ch. 212.

(*o*) *Goodall v. Burrows* (1859) 7 Gr. 449; *Heney v. Kerr* (1890) 10 C.L.T. 60. See Ont. Rule 382.

(*p*) *Searlett v. Birney* (1893) 15 P.R. 283: in this case the amount to be paid was about \$150,000, and three months further time was allowed.

(*q*) Ont. Rule 385.

(*r*) *Senhouse v. Earl* (1752) 2 Ves. Sen. 449.

(*s*) *Mulligan v. Hendershott* (1896) 17 P.R. 227, following *Train v. Smith*, before Spragge, C. 14th April, 1875, not reported; see *Laplante v. Scamen* (1883) 8 Ont. App. 557.

required. Thus where it appeared by the report that a defendant had not received notice of the proceedings in the Master's office, the case being one in which he was entitled to notice, notice of the motion was required to be served on him (*t*). And where the account has been changed by the receipt of moneys after the day fixed for redemption, notice of motion must be served (*u*).

The final order of foreclosure may be refused where the mortgagor seeks an extension of time, and reasonable grounds are shewn therefor (*v*).

Master in
Chambers
may grant
final order.

The motion may be made before the Master in Chambers or a local officer exercising similar powers, and must be supported by an affidavit proving that the mortgage debt has not been paid and (if such is the case) that the plaintiff has not been in possession of the lands or in receipt of the rents or profits thereof. Where in a foreclosure action in British Columbia the certificate of the registrar directed that the moneys should be paid at the office of the agent in Victoria of the plaintiffs, a foreign corporation, affidavits of non-payment by both principals and agent were required (*w*).

Notice of
credit.

If any sum has been received by the plaintiff before the day fixed for redemption, the affidavit must show that notice of credit was given to the person by whom the mortgage debt was payable (*x*). In *London and Canadian Loan and Agency Co. v. Everitt* (*y*) Spragge, C., although disapproving of the practice, directed that a final order of

(*t*) *McCormick v. McCormick* (1874) 6 P.R. 208.

(*u*) *Portman v. Smith* (1866) 2 C.L.J. 167.

(*v*) *Collinson v. Jeffrey* [1896] 1 Ch. 644.

(*w*) *Canada Settlers' Loan Co. v. Renouf* (1897) 5 B.C.R. 243.

(*x*) Ont. Rule 387. Where in a mortgage suit a payment is made during the time fixed for redemption and no notice of credit is given there should be an order referring it to the Master to fix, or the order itself may fix a new day for payment: *Manitoba & North West Loan Co. v. Scobell* (1885) 2 Man. R. 125.

(*y*) (1881) 8 P.R. 489. It has not been the practice in Ontario for some years to reserve a day to show cause in either the judgment or the final order. The interests of the infant are deemed to be sufficiently protected by the Official Guardian. See *supra* p. 241.

foreclosure should reserve a day for infant defendants to show cause after attaining majority.

So long as the final order of foreclosure remains in force, it is a complete bar to the right to redeem; but the mortgagor may apply to set aside the order and to be allowed to redeem.

Effect of final order of foreclosure.

In *Campbell v. Holyland* (z) Jessel, M.R. said:—

"The court made various orders—interim orders fixing a time for payment of the money—and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the original deed was form only; for the courts of equity soon decided that notwithstanding the form of that order they would after that order allow the mortgagor to redeem. That is although the order of foreclosure absolute appeared to be a final order of the court, it was not so, but the mortgagee still remained liable to be treated as mortgagee, and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the court. Therefore, everybody who took an order of foreclosure absolute knew that there was still a discretion in the court to allow the mortgagor to redeem."

Where third parties have not acquired rights to the property, and the mortgagee can be recompensed in money, the foreclosure may be opened and the time for redemption extended. But some reasonable excuse must be shown for not having redeemed by the time fixed.

Under what circumstances foreclosure will be opened.

Where it was shown that the money was ready, but owing to illness and accident could not be paid at the exact time, this was held to be a sufficient ground (a). And the relief was given in a case in which it was shown that the mortgagee had repeatedly stated, before and after the decree absolute, that he wanted the money not the property, and the mortgagor was under a reasonable belief that the mortgagee would extend the time for payment, and the value of the property considerably exceeded the mortgage debt (b).

A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, and had no

(z) (1877) 7 Ch. D. 166, at p. 171.

(a) *Jones v. Creswicke* (1839) 9 Sim. 304.

(b) *Thornhill v. Manning* (1851) 1 Sim. N.S. 451.

solicitor in the cause, and misunderstood the object of the bill which was the only paper served on him, the value of the property appearing to be three times the amount of the mortgage debt (c).

Where there has been actual, positive fraud, and not mere constructive fraud, on the part of the mortgagee, or where he has insisted on rights which upon due investigation are found to have been overstated, this relief may be afforded to the mortgagor (d).

Opening
foreclosure
as against
purchaser
from
mortgagee.

This relief has been granted even as against the purchaser from the mortgagee after the final order of foreclosure. But there must be strong grounds for disturbing the purchaser. Thus, if the purchaser bought the lands within a short time after the final order was made and with notice of the fact that they were of much greater value than the mortgage debt, the foreclosure might be opened as against him. But the court would be disinclined to interfere with a person who purchased the lands many years after the date of the order and without notice of any circumstances which might lead to opening the foreclosure (e).

And where the decree directed foreclosure, and a final order was made dismissing the bill instead of foreclosing the plaintiff, and where, further, the report of the Master allowed the plaintiff only six weeks to redeem, although the decree gave him six months, it was held that these were such irregularities as to give notice to the purchaser from the mortgagee that there was something unusual in the proceeding, and the mortgagor was allowed to redeem (f).

Application
must be
prompt.

The mortgagor must make his application to open the foreclosure within a reasonable time. What is a

(c) *Platt v. Ashbridge* (1865) 1^o Gr. 105; see *Ford v. Wastell* (1847) 6 Ha. 229.

(d) *Patch v. Ward* (1807) 3 Ch. 203.

(e) *Campbell v. Holyland* (1877) 7 Ch. D. 166.

(f) *Johnston v. Johnston* (1882) 9 P.R. 259.

reasonable time will depend upon the nature of the property (g).

The terms are in the discretion of the court. The mortgagor must satisfy the court that he will be able to redeem if further time is allowed, and he may be required to pay the interest and costs by an early date; or to pay the costs forthwith; or to give security for costs in the event of default (h). Terms upon which foreclosure opened.

The final order of foreclosure is no bar to proceedings by the mortgagee to recover on the covenant, so long as he retains the mortgaged lands and is in a position to restore them to the mortgagor. If, after the final order of foreclosure, the mortgagee sues the mortgagor on the covenant, the mortgagor acquires a new right to redeem even although he has parted with the equity of redemption, and is entitled to a reconveyance on payment of the mortgage debt (i). But if, after the final order of foreclosure, the mortgagee has parted with the mortgaged lands, or any part thereof, so that he is unable to reconvey the lands to the mortgagor, he will be restrained from proceeding on the covenant (j). Notwithstanding standing foreclosure mortgagee may sue on covenant.

(g) *Campbell v. Holyland* (1877) 7 Ch. D. 166.

(h) See *Trinity College v. Hill* (1885) 8 Ont. 286; *Holford v. Yate* (1855) 1 K. & J. 677; *Whitfield v. Roberts* (1861) 7 Jur. N.S. 1268; *Howard v. Macara* (1859) 1 Chy. Ch. 27.

(i) *Lockhart v. Hardy* (1846) 9 Beav. 349; *Palmer v. Hendrie* (1859) 27 Beav. 349; 28 Beav. 341; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636.

(j) *Lockhart v. Hardy* (1846) 9 Beav. 349; *Gowland v. Garbutt* (1867) 13 Gr. 578; *Burnham v. Galt* (1869) 16 Gr. 417; *Chatfield v. Cunningham* (1892) 23 Ont. 153.

CHAPTER XVII.

LIMITATION OF ACTIONS FOR FORECLOSURE AND POSSESSION.

i. *Limitation Generally.*

Action
barred in
ten years.

The limitation of the mortgagee's right to bring an action for foreclosure or possession is governed by section 4 of the *Real Property Limitation Act* (*a*), which is as follows :—

4. No person shall make an entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same (*b*).

These provisions were first enacted in Canada by 4 Will. IV. (1834) chapter 1, s. 16, being taken from the Imperial Act 3 & 4 Will. IV. chapter 27, s. 2, which was re-enacted in England in 1874 by 37 & 38 Vict. chapter 57, s. 1. They were also re-enacted in Ontario in 1874 by 38 Vict. chapter 16, s. 1.

Formerly
no time
limited in
equity.

Before the passing of the *Real Property Limitation Act* in England there was no limit of time fixed by statute within which a suit might be brought in equity for foreclosure, the Statute of James (21 Jac. I. c. 16) having been held to apply only to actions at law. Courts of equity, however, acted by analogy to the statutory rule

(*a*) R.S.O. (1897) c. 133.

(*b*) In Nova Scotia the corresponding act is R.S.N.S. (1884) c. 112. In New Brunswick C.S.N.B. (1877) c. 84. In Manitoba R.S. Man. (1891) c. 89.

governing courts of law and fixed the limit for foreclosure at the same period as that fixed by statute for actions at law.

It has been held that an action for foreclosure is an action for the recovery of land within the meaning of the section quoted, and not an action for the recovery of money charged on land within the meaning of section 23 (c).

In New Brunswick it has been held that the section of the limitation act of that Province corresponding to section 4 of the Ontario Act (*d*) does not apply to the case of mortgagor and mortgagee: therefore, the right of the mortgagee to maintain ejectment is not barred although the mortgagor may have been in possession over twenty years after the execution of the mortgage (*e*).

The *Real Property Limitation Act* applies to real property only; there is no statute applicable to mortgages of personalty. Thus, where a bank had an equitable charge on shares in a limited company to secure a simple contract debt and, after the debt was barred, brought an action to enforce their security by foreclosure or sale, it was held that the bank was not deprived of its remedy against the property by the fact that the personal remedy for the debt was barred, and that, there being no statute of limitations applicable to foreclosure of a mortgage of personal property, the security was enforceable (*ee*).

Foreclosure
is an action
for the
recovery
of land.

Act applies
to real
property
only.

(*e*) *Wrixon v. Vize* (1842) 3 Dr. & War. 104; *Heath v. Pugh* (1881) 6 Q.B.D. 345; 7 App. Cas. 235; *Harlock v. Ashberry* (1882) 19 Ch. D. 539; *Trust and Loan Company v. Stevenson* (1892) 20 Ont. App. 66, per MacLennan, J.A. at p. 80; *Barwick v. Barwick* (1874) 21 Gr. 39; *Fletcher v. Rodden* (1882) 1 Ont. 155. An action for redemption is also an action for the recovery of land; see *Faulds v. Harper* (1886) 11 S.C.R. 639.

(*d*) 6 Wm. IV. c. 43, s. 2.

(*e*) *Doe d. Chipman v. DeVeber* (1854) 3 All. (New Bruns.) 23; but see *Doe d. Falls v. Jones* (1862) 5 All. (New Bruns.) 252.

(*ee*) *London and Midland Bank v. Mitchell* [1899] 2 Ch. 161.

ii. *When the Right Arises.*

Accrual of right.

Section 5 of the *Real Property Limitation Act* provides that the right of entry, or distress, or to bring an action to recover the land, shall be deemed to have first accrued at the time when the person claiming first became entitled to possession.

Breach of condition.

When the person claiming has become entitled by reason of any forfeiture or breach of condition then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. This is provided by sub-section 9 of section 5 which is as follows :—

5. (9) Where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken.

Future estates.

Where the estate is a future estate, as an estate in reversion or remainder, the right of action shall be deemed to have accrued when the estate became an estate in possession. This is provided by sub-section 11 of section 5 which is as follows :—

5. (11) Where the estate or interest claimed is an estate or interest in reversion or remainder or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

Vacant land; statute does not begin to run until possession actually taken.

The right to bring an action in such a case continues for ten years after the estate has become an estate in possession, even although the action on the covenant has been in the meantime barred by lapse of time (*f*).

The statute does not begin to run against a mortgagee of land in a state of nature until actual possession is taken by some person not claiming under him (*g*).

(*f*) *Hugill v. Wilkinson* (1888) 38 Ch. D. 480.

(*g*) *Bucknam v. Stewart* (1897) 11 Man. R. 625; *Smith v. Lloyd* (1854) 9 Ex. 562; *Agency Company v. Short* (1888) 13 App. Cas. 793; *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11; but see *Doe d. McLean v. Fish* (1849) 5 U.C.R. 295.

The possession of the mortgagor is not adverse to the rights of the mortgagee, and the statute does not begin to run against the mortgagee until his right to bring the action arises (*h*).

When the mortgage is in the ordinary form the right of action arises when the mortgagor has made default in payment of principal or interest. Default of payment.

If, however, the mortgage deed does not contain a provision that the mortgagor shall be entitled to remain in possession, the time will begin to run from the date of the mortgage (*i*).

In the case of a mortgage payable on demand, the right of action arises immediately upon the execution of the mortgage, and a demand is not necessary (*j*). Mortgage payable on demand.

Where after the statute has begun to run against the owner of lands in favour of a trespasser the owner mortgages the lands, this gives the mortgagee a new right of entry and creates a new starting point for the statute, so that the mortgagee may maintain an action against the trespasser within the statutory period, although the right of the mortgagor may have been barred (*k*). Execution of a mortgage gives new starting point.

A purchaser of lands sold under a power of sale contained in the mortgage is a person claiming under a mortgage within the meaning of section 22, and the statute begins to run against him from the time of sale (*l*). Sale under power gives new starting point.

The registration of a discharge of mortgage has the effect of revesting the title in the mortgagor and gives the statute a new starting point in favour of the mortgagor against a person claiming possession adversely (*m*). Registration of a discharge gives a new starting point.

(*h*) *Doe d. Jones v. Williams* (1836) 5 A. & E. 291; *Wrixon v. Vize* (1842) 3 Dr. & War. 104.

(*i*) *Doe d. Roylance v. Lightfoot* (1841) 8 M. & W. 553.

(*j*) *Re J. Brown's Estate, Brown v. Brown* [1893] 2 Ch. 300.

(*k*) *Cameron v. Walker* (1890) 19 Ont. 212.

(*l*) *Cameron v. Walker* (1890) 19 Ont. 212; see also *Doe d. Baddeley v. Massey* (1851) 17 Q.B. 373; *Heath v. Pugh* (1881) 6 Q.B.D. 345; 7 App. Cas. 235.

(*m*) *Henderson v. Henderson* (1896) 23 Ont. App. 577.

In England a different conclusion was reached by the Court of Appeal in *Thornton v. France* (*n*). In that case the owner of an undivided moiety of lands, which had been during the previous eleven years in the sole possession of the owners of the other moiety, executed in 1886 a mortgage of his moiety. In 1890 there being no change of possession he conveyed to the plaintiff subject to the mortgage, which the plaintiff afterwards paid off. In an action for a declaration of title it was held that the plaintiff was not a "person claiming under a mortgage" within the meaning of the statute, and that a mortgagee does not acquire a new right of entry by virtue of the statute where at the date of the mortgage the statute has already begun to run against the mortgagor in favour of a person in adverse possession.

iii. Acknowledgment.

Acknow-
ledgment
by person in
possession.

If an acknowledgment of title in writing signed by the person in possession has been given to the person claiming foreclosure or his agent, the right to bring an action shall be deemed to have accrued at the time of such acknowledgment. This is provided for by s. 13 which is as follows:—

13. Where any acknowledgment of the title of the person entitled to any land or rent has been given to him or to his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*o*).

It must be
in writing.

The acknowledgment must be in writing and signed by the person in possession. Where a written acknowledgment has been lost it may be proved by parol (*p*).

(*n*) [1897] 2 Q.B. 143, C.A.

(*o*) R.S.O. (1897) c. 133, s. 13.

(*p*) *Haydon v. Williams* (1830) 7 Bing. 163.

An acknowledgment under section 13 differs from that required by section 23. Under the former section the acknowledgment must be signed by the person in possession; under section 23 it may be signed by the person by whom the money sought to be recovered is payable or his agent. Difference between section 13 and section 23.

Section 23 is as follows:—

23. No action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person by whom the same is payable, or his agent, to the person entitled thereto or his agent; and in such case no action or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given (*q*).

An acknowledgment signed by an agent of the person in possession under section 13 was held to be insufficient (*r*). But an acknowledgment signed by an agent at the dictation of the principal, who was too ill to write, has been held to be good (*s*). Acknowledgment by agent.

The acknowledgment under both sections is good if given to the person entitled or his agent. An acknowledgment given to a third person is ineffectual (*t*). Where a defendant by his answer in a suit in Chancery acknowledged the plaintiff's title this was held in a subsequent suit to be a good acknowledgment (*u*). To the person entitled.

An acknowledgment to a trustee of the person entitled is sufficient to give the statute a new starting point (*v*). To a trustee.

(*q*) R.S.O. (1897) c. 133. For a discussion of this section see Chapter IX, *supra* p. 97.

(*r*) *Ley v. Peter* (1858) 3 H. & N. 101.

(*s*) *Corporation of Dublin v. Judge* (1847) 11 Ir. L.R. 8.

(*t*) *Furdon v. Clegg* (1842) 10 M. & W. 572.

(*u*) *Goode v. Job* (1858) 28 L.J.Q.B. 1.

(*v*) *McIntyre v. The Canada Co.* (1871) 18 Gr. 367.

An acknowledgment made by the person in possession to the mortgagor will have the effect of saving the mortgagee's rights (*w*).

**Form of
acknow-
ledgement.**

It may be laid down as a general rule that any form of words that may reasonably be construed into an admission of the right of the person entitled will be sufficient. A letter written by the person in possession, asking for time for payment, to the mortgagee's solicitor in reply to a letter demanding payment, is a good acknowledgment (*x*).

**Question for
judge not
jury.**

The words in the section "at the time of giving same" mean at the time the acknowledgment was signed and not necessarily at the date it bears on its face (*y*).

It is a question for the judge, and not the jury, to decide whether a writing is a sufficient acknowledgment of title (*z*).

A verbal acknowledgment is insufficient to prevent the statute from running (*a*).

iv. *Part Payment.*

An action may be brought within ten years next after the last payment of any part of the principal money or interest secured by the mortgage, although more than ten years may have elapsed since the time at which the right to bring the action first accrued.

This is provided for by section 22 which is as follows:—

22. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued (*b*).

(*w*) *Hooker v. Morrison* (1881) 28 Gr. 369.

(*x*) *Furdon v. Clogg* (1842) 10 M. & W. 572.

(*y*) *Doe d. Curzon v. Edmunds* (1840) 6 M. & W. 295.

(*z*) *Doe d. Curzon v. Edmunds* (1840) 6 M. & W. 295.

(*a*) *Perry v. Henderson* (1847) 3 U.C.R. 486 at p. 499.

(*b*) R.S.O. 1897, c. 133.

This section was first enacted in Canada by 16 Vict (1853) chapter 121, being taken from the English Act 7 Will. IV. and 1 Vict. chapter 28.

Section 22 refers to actions for the recovery of land; section 23 refers to actions for the recovery of money (*c*).

The former section does not provide by whom the payment is to be made, but it has been held that a payment made by any person who is liable to pay is sufficient to keep the remedy alive as against the land (*ee*). The payment must be by a person who has some right to pay and whose payment the mortgagee could not properly refuse (*d*).

In *Re Friesley, Allison v. Friesley* (*e*) Fry, L.J. in referring to the word "payment" in the section of the English act corresponding to section 23, said:—

"In my opinion a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it."

In *Newbould v. Smith* (*f*) it was held that payments made by a mortgagor will not keep alive the remedy of the mortgagee against the mortgaged property in the hands of the purchaser of the equity of redemption. The case afterwards went to the House of Lords (*g*) and was affirmed on other grounds, but the rule laid down by the Court of Appeal was adversely criticised. Lord Herschell said:—

"I must not be considered as in any way affirming or giving my adhesion to that proposition."

(*c*) *Trust and Loan Co. v. Stevenson* (1892) 20 Ont. App. 66.

(*ee*) *Harlock v. Ashberry* (1882) 19 Ch. D. 539.

(*d*) *Trust and Loan Co. v. Stevenson* (1892) 20 Ont. App. 66; *Re Friesley, Allison v. Friesley* (1889) 43 Ch. D. 106.

(*e*) (1889) 43 Ch. D. 106.

(*f*) (1886) 33 Ch. D. 127.

(*g*) (1889) 14 App. Cas. 423.

The decision was not followed in *Trust and Loan Co. v. Stevenson (h)*.

Where a subsequent mortgagee purchased the equity of redemption from the assignee in insolvency of the mortgagor and became liable to pay the prior mortgage under section 19 of the *Insolvent Act* of 1865 (29 Vict. chapter 18), it was held that payments made by such purchaser after he had parted with the equity of redemption were sufficient to keep alive the remedy of the mortgagee against the lands (i).

Receipt of rents not a payment.

Payment by tenant.

Payment by principal debtor.

Payment by owner of part of land.

Payment by a stranger.

Payment by receiver.

The receipt of rents and profits by the mortgagee has been held not to be a payment by the mortgagor or on his behalf so as to give the statute a new starting point (j). Nor will payment of rent by a tenant of the mortgagor in pursuance of a notice served by the mortgagee give a new starting point (k).

But where a surety had mortgaged property of his own to secure the debt of the principal, it was held by the Privy Council that under the corresponding section in force in New Brunswick payments made by the principal debtor kept the remedy alive as against the land of the surety (l).

So where a mortgagor sells part of the mortgaged premises, payments made by him will be sufficient to keep the statute from running in favour of the lands sold (m).

Payments made by a stranger will not prevent the statute from running against a mortgagee (n).

But payments made by a receiver, who is in possession of one part of the mortgaged lands, will have the effect

(h) (1892) 20 Ont. App. 66.

(i) *Trust and Loan Co. v. Stevenson* (1892) 20 Ont. App. 66.

(j) *Cockburn v. Edwards* (1881) 18 Ch. D. 449.

(k) *Harlock v. Ashberry* (1882) 19 Ch. D. 539.

(l) *Lewin v. Wilson* (1886) 11 App. Cas. 639.

(m) *In re Lord Muskerry* (1858) 9 Ir. Ch. 94.

(n) *Chinnery v. Evans* (1864) 11 H.L.C. 115; *Newbould v. Smith* (1886) 33 Ch. D. 127; 14 App. Cas. 423.

of preventing the statute from running in favour of a purchaser of another part of the mortgaged lands (*o*).

Payments made by a mortgagor who has parted with the equity of redemption will save the rights of the mortgagee against the land in possession of the purchaser (*p*).

Where the mortgagor has made a payment or given an acknowledgment of title this ^{w¹¹} be sufficient to keep the right of the mortgagee alive as against a stranger who has been in adverse possession for more than the statutory period (*q*).

If the person entitled is under the disability of infancy, idiocy, lunacy or unsoundness of mind, at the time when his right first accrues, an action may be brought within five years after his death or after his disability has ceased, whichever shall first happen, but the period shall not in any case exceed twenty years; and no further time shall be allowed for a succession of disabilities. This is provided by sections 43, 44 and 45 of the act, which are as follows:—

43. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues as in sections 4, 5 and 6 mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiocy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

44. No entry, distress or action shall be made or brought by any person, who at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued was under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.

(*o*) *Chinnery v. Evans* (1864) 11 H.L.C. 115.

(*p*) *In re Lord Muskerry* (1858) 9 Ir. Ch. 94.

(*q*) *Doe d. Palmer v. Eyre* (1851) 17 Q.B. 366.

Payment by
mortgagor
who has sold
his equity.

Payment by
mortgagor
as against
a stranger.

Further
time for
disabilities.

45. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the said period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person (*r*).

The section of the English act corresponding to section 43 includes coverture as a disability (*s*).

If a person is under a disability when his right first accrues and then falls under another disability before the removal of the first, his right may be enforced after the removal of the second provided it be within twenty years (*t*).

On the other hand a disability arising after the right has accrued will not prevent the time from running (*u*).

The disability must be the disability of the mortgagee or those claiming under him; the time will not be extended by reason of the disability of the mortgagor (*v*).

Second
disability
before
removal of
first.

Disability
arising after
right of
action does
not avail.

Right
accrues when
fraud
discovered.

vi. Concealed Fraud.

In case of concealed fraud the statute does not begin to run until the fraud is discovered or might have been discovered with reasonable diligence. This is provided by section 31 which is as follows:—

31. In every case of a concealed fraud the right of any person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered.

(*r*) R.S.O. (1897) c. 133.

(*s*) 37 & 38 Vict. Imp. (1874) c. 57, s. 3; see *Hicks v. Williams* (1888) 15 Ont. 228.

(*t*) *Burrows v. Ellison* (1871) L.R. 6 Ex. 128.

(*u*) *Murray v. Watkins* (1890) 62 L.T. 796.

(*v*) *Forster v. Patterson* (1881) 17 Ch. D. 132.

Concealed fraud, to take the case out of the statute, must be the fraud of the person who seeks the protection of the statute or his agent (*w*).

Must be
fraud of
person who
relies on
statute.

vii. *Extinguishment of Right.*

If no action is brought within the period limited by the act the right itself as well as the remedy is extinguished. This is provided by section 15 which is as follows:—

Right as
well as
remedy
extinguished

15. At the determination of the period limited by this act to any person for making an entry or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action respectively might have been made or brought within such period shall be extinguished (*x*).

The effect of this section is to vest the lands in the mortgagor in the same manner as if a reconveyance had been executed (*y*). Under the *Real Property Limitation Act* the right itself is extinguished. The statute differs in this respect from the statute of James (21 Jac. chapter 16) whereby the remedy only is barred (*z*).

Lands
revested.

A mortgagee who has suffered the statute to run before he asserts his right of entry cannot, by afterwards getting possession of the property, revive his title to it, but he is in as a mere trespasser. The insolvency of the mortgagor and the appointment of an assignee in insolvency does not suspend the running of the *Statute of Limitations* so as to preserve the lien and security of the mortgagee on the land mortgaged (*a*).

Subsequent
possession
does not
revive title.

An acknowledgment given after the statutory period has elapsed is insufficient to revive the title. Under

Acknow-
ledgment
does not
revive title.

(*w*) *Thorne v. Heard* [1895] A.C. 495.

(*x*) R.S.O. (1897) c. 133.

(*y*) *Doe d. Jukes v. Sumner* (1845) 14 M. & W. 39; *Doe d. Carter v. Barard* (1849) 13 Q.B. 952; *Kibble v. Fairthorne* [1895] 1 Ch. 219; but see *Tichborne v. Wier* 4 R. 26 [1893].

(*z*) *Gray v. Richford* (1878) 2 S.C.R. 431 at p. 454.

(*a*) *Court v. Walsh* (1882) 1 Ont. 167; affirmed 9 Ont. App. 294; *Doe d. Dunlop v. McNab* (1859) 5 U.C.R. 289.

section 15 the right as well as the remedy is extinguished (b).

Where the mortgaged lands are not re-demised to the mortgagor, and the land is vacant at the time of the execution of the mortgage, the mortgagee is deemed to be in possession by operation of law, and the presumption of payment of the mortgage moneys after the lapse of the statutory period does not arise, even although the mortgagee has never made an actual entry or received any payment on account of the mortgage. The mere fact that the remedy on the covenant is barred by the *Statute of Limitations* will not establish a payment so as to reconvey the legal title to the mortgagor (c).

So where a right of entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired by anyone, the constructive possession thereof is in the mortgagee, and the *Statute of Limitations* does not run against him so as to extinguish his title to the lands, the mortgage being in default and no presumption of payment arising (d).

Where a mortgagee has neither taken possession of the land after default nor received interest within the statutory period the title is in the mortgagor, and the mortgagee cannot maintain an action of ejectment against a third person (e).

Where a purchaser in examining a title found a mortgage which matured over 80 years previously, apparently outstanding, and required the vendors to produce the discharge of it which they declined to do, it was held that under all the circumstances the mortgage must be presumed to have been paid (f).

(b) *Sanders v. Sanders* (1881) 19 Ch. D. 373; *Bryan v. Cowdal* (1873) 21 W.R. 693.

(c) *Mahar v. Fraser* (1867) 17 U.C.C.P. 408.

(d) *Delaney v. Canadian Pacific R.W. Co.* (1891) 21 Ont. 11.

(e) *Doe d. McLean v. Fish* (1859) 5 U.C.R. 295.

(f) *Imperial Bank of Canada v. Metcalfe* (1886) 11 Ont. 467.

Presumption
of payment.

viii. *Effect of Bringing Action.*

Where an action has been brought for foreclosure or possession, the time does not run while the action is current (g). Action arrests the running of statute.

And where a decree of foreclosure does not include an order for possession, the time begins to run for recovery of possession from the date of the decree (h).

If the action is discontinued, or if the writ has not been served within twelve months and has not been renewed, the time will not be interrupted (i). Discontinuance.

Where an action has become defective by the death of a party or otherwise, the discretion of the court will not be exercised to allow the proceedings to continue if there has been great delay or gross negligence (j). Abatement.

It has been held that a proceeding under the *Quieting Titles Act* (k) is not an action or proceeding that will prevent the statute from running (l).

Where in Nova Scotia an action of ejectment was brought by the mortgagee to recover possession of the mortgaged lands, in which judgment was obtained and a writ of possession issued but not executed, it was held that these proceedings prevented the statute from operating as against the mortgagee seeking foreclosure (m).

(g) *Wrixon v. Vize* (1842) 3 Dr. & War. 104; *Turley v. Williamson* (1863) 15 U.C.C.P. 538.

(h) *Pugh v. Heath* (1882) 7 App. Cas. 235.

(i) *Pratt v. Hawkins* (1846) 15 M. & W. 399; *Doyle v. Kaufman* (1877) 3 Q.B.D. 340; but see *Hewett v. Barr* [1891] 1 Q.B. 98.

(j) *Curtis v. Sheffield* (1882) 20 Ch. D. 398.

(k) R.S.O. (1897) c. 135.

(l) *Laing v. Avery* (1867) 14 Gr. 33.

(m) *McKeen v. McKay* (1875) Russ. (N.S.) 121.

CHAPTER XVIII.

COSTS.

Preliminary costs.

The general practice is to deduct from the mortgage loan the mortgagee's costs of negotiating the loan, investigating the title and preparing the mortgage deed. It is doubtful whether the mortgagee, apart from special agreement, can add these costs to the mortgage debt and charge them on the lands, so as, for example, to insist upon payment of them as a condition of redemption (*a*).

If the mortgage transaction falls through, the proposed lender has no claim against the borrower, in the absence of special agreement, for costs of negotiating the loan or investigating the title (*b*).

In an action to foreclose an equitable mortgage by deposit of title deeds with a memorandum whereby the mortgagor agreed to execute a legal mortgage of all his estate and interest in the mortgaged lands, the mortgagees were allowed the following:—(*a*) costs of preparing a legal mortgage; (*b*) costs of correspondence with the mortgagor as to the legal mortgage; (*c*) costs of correspondence with a surety who had given a promissory note for part of the mortgage debt. But the mortgagees were not allowed the costs of investigating the title, for the mortgagor had only agreed to execute a legal mortgage of his estate and interest (*c*).

Mortgagee's right to costs in action for foreclosure or redemption.

Equity acting on the maxim that he who seeks equity must do equity requires the mortgagor seeking to redeem, whether the action be for foreclosure or for redemption,

(*a*) See *Gregg v. Slater* (1856) 22 Beav. 314.

(*b*) *Melbourne v. Cottrell* (1857) 29 L.T. 293; *Holborrow v. Lloyd* (1859) 5 Jur. N.S. pt. 2, 114.

(*c*) *National Provincial Bank of England v. Games* (1886) 31 Ch. D. 582, C.A.

to pay the mortgagee not only the principal and interest but also all costs properly incurred by the mortgagee in relation to his mortgage security.

In *Detillin v. Gale* (*d*) Lord Eldon said :—

"The owner coming to deliver the estate from that incumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to [that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified."

The mortgagee is entitled to the costs of sale proceedings, taken reasonably, which prove abortive. And the costs were allowed where the sale was abortive by reason of the subsequent dishonour of a cheque which the auctioneer accepted from a bidder as a deposit (*e*).

Costs of
abortive sale

A mortgagee is not entitled to the costs of an application for leave to bid at the mortgage sale (*f*).

A mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful litigation undertaken by himself without the approval of the mortgagor (*g*).

Costs of
unsuccessful
proceedings
by mortgagee

The costs to which the mortgagee is properly entitled will be added to the mortgage debt as if they had formed part of the moneys originally secured by the mortgage, and will rank in priority to all persons claiming under the mortgagor including subsequent incumbrancers (*h*).

Proper costs
added to
mortgage
debt.

Where a subsequent incumbrancer institutes proceedings to redeem prior incumbrancers and foreclose subsequent incumbrancers and the mortgagor, his costs are added to his mortgage debt and do not take priority over earlier charges (*i*).

Costs of
proceedings
by subse-
quent incum-
brancer.

(*d*) (1802) 7 Ves. 583; 6 R.R. 192; 18 R.C. 502.

(*e*) *Farrer v. Lacy, Hartland & Co.* (1885) 25 Ch. D. 636; 31 Ch. D. 42; see *Corsellis v. Patman* (1867) L.R. 4 Eq. 156; *Cameron v. McIlroy* (1884) 1 Man. R. 242.

(*f*) *Ex parte Williams* (1832) 1 D. & C. 489.

(*g*) *Peers v. Ceely* (1852) 15 Beav. 209; *Burke v. O'Connor* (1853) 4 Ir. Ch. 418; *Wells v. Trust and Loan Co. of Canada* (1884) 9 Ont. 170.

(*h*) *Dryden v. Frost* (1838) 3 My. & Cr. 670; *Barnes v. Ruxton* (1842) 1 Y. & C.C.C. 401; *National Provincial Bank of England v. Games* (1886) 31 Ch. D. 582, C.A.

(*i*) *Wright v. Kirby* (1857) 23 Beav. 463.

Subsequent
incumbran-
cer may be
entitled to
priority of
costs.

Costs of
defendant
disclaiming.

Costs are not
a debt from
mortgagor.

If a subsequent incumbrancer takes proceedings the result of which is to secure a fund for the benefit of all incumbrancers, his costs, in so far as the prior incumbrancers have had the benefit of them, will take priority over the other incumbrances (j).

Where a defendant in an action for foreclosure or redemption disclaims in such a manner as to show that he never had and never claimed an interest, or if he had an interest that he had disclaimed or offered to disclaim before the action was begun, he is entitled to his costs (k). If he neither disclaims or offers to disclaim until he puts in his defence he is not entitled to his costs (l).

If a person is properly made a defendant as being interested in the mortgaged property the plaintiff is not required to apply to him in order to ascertain whether or not he claims an interest; but the plaintiff is entitled to a disclaimer from him if he claims no interest (m). If a defendant puts in a defence instead of a disclaimer he will not be allowed costs (n).

When a person is served with an appointment to attend upon proceedings in the Master's office and neglects to attend, such non-attendance shall be treated as a disclaimer (o). And if such person appears and disclaims he is not entitled to costs (p).

The mortgagee's right to add his proper costs to the mortgage debt, while it arises out of the mortgage contract, is not founded on an implied contract by the mortgagor to

(j) *Ford v. Earl of Chesterfield* (1856) 21 Beav. 426; *Batten, Proffitt & Scott v. Dartmouth Harbour Commissioners* (1890) 45 Ch. D. 612.

(k) *Teed v. Carruthers* (1842) 2 Y. & C.C.C. 31; *Ford v. Earl of Chesterfield* (1853) 16 Beav. 516; *Earl of Cork v. Russell* (1871) L.R. 13 Eq. 210; *Broughton v. Key* (1882) W.N. 3.

(l) *Cash v. Belcher* (1842) 1 Ha. 310; *Grigg v. Sturgis* (1846) 5 Ha. 93.

(m) *Maxwell v. Wightwick* (1866) L.R. 3 Eq. 210.

(n) *Bradley v. Borlase* (1858) 7 W.R. 125.

(o) Ont. Rule 749.

(p) *Hatt v. Park* (1858) 6 Gr. 553; *Lewin v. Jones* (1884) 51 L.T. 59.

pay such costs, and although they are recoverable as the price of redemption they do not constitute a debt of the mortgagor for the recovery of which an action may be brought (q).

The general rule is that costs are in the discretion of the court or judge; and no order as to costs only which by law are left to the discretion of the court is subject to appeal except by leave of the court or judge making the order (r).

But the discretion of the court or judge does not extend to deprive a mortgagee of any right to costs to which he would be entitled according to the rules acted upon in courts of equity prior to the *Ontario Judicature Act, 1881* (s).

In *Cotterell v. Stratton* (t) Selborne, L. C. said :—

"The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the court, which in litigious cases is generally not subject to review."

The right of a mortgagee to costs arises out of the mortgage contract, and unless that right has been forfeited for one or more of the reasons that will be discussed presently the mortgagee's costs are not in the discretion of the judge. If, therefore, the judge wrongfully deprives the mortgagee of his costs on the ground that he has forfeited his right arising out of the contract the mortgagee has a right of appeal (u).

It would appear that a mortgagor has no right of appeal from an order negativing misconduct and allowing the mortgagee his costs. For if the mortgagee has been guilty of misconduct his costs then become costs within

Costs as a general rule in discretion of court.

Mortgagee's costs an exception to the rule.

Mortgagee may appeal as to costs.

Mortgagor may not appeal.

(q) *Ex parte Fewings* (1883) 25 Ch. D. 338.

(r) Ont. Rule 1130 (1); Ont. Jud. Act, R.S.O. (1897) c. 51, s. 72.

(s) Ont. Rule 1130, sub-s. 2.

(t) (1872) 8 Ch. 295.

(u) *Charles v. Jones* (1886) 33 Ch. D. 80, C.A.

the discretion of the judge and there is no appeal from the order without the judge's leave. (*v*).

Mortgagee may be deprived of costs, or ordered to pay costs.

Mortgagee claiming absolute title.

Unfounded charges of fraud.

Mortgagee *bona fide* claiming more than is due him.

A mortgagee may be deprived of his costs, or even ordered to pay costs, if he resists the right to redeem, makes unfounded claims, improperly refuses to account or causes vexatious delays and unnecessary costs (*w*).

A mortgagee who took a deed absolute in form, instead of with a defeasance, and then denied the right to redeem setting up the deed as constituting an absolute purchase, was ordered to pay the costs of the action for redemption (*x*).

Where in a foreclosure action the mortgagee made unfounded charges of fraud against the mortgagor he was disallowed the costs occasioned by his improper conduct (*y*).

A mortgagee will not be deprived of costs merely because he *bona fide* claims more than is due to him (*z*).

Where in a redemption action the mortgagee claimed \$905 to be due and the balance due was found to be \$1.32, it was held that as the defendant had advanced his claim honestly and under a reasonable belief that the sum claimed was due he was entitled to the benefit of the rule that a mortgagor coming to redeem is liable for the costs if the balance is found in favour of the defendant (*a*).

(*v*) *Charles v. Jones* (1886) 33 Ch. D. 80, C.A; see *Re Beddoe, Downes v. Cottam* [1893] 1 Ch. 547.

(*w*) *Detillin v. Gale* (1802) 7 Ves. 583; 6 R.R. 102; 18 R.C. 502; *Cotterell v. Stratton* (1872) 8 Ch. 295; *Cottrell v. Finney* (1874) 9 Ch. 541; *National Bank of Australasia v. United Hand-in-Hand etc. Co.* (1879) 4 App. Cas. 391; *Bank of New South Wales v. O'Connor* (1889) 14 App. Cas. 273; *Bryson v. Huntington* (1877) 25 Gr. 265; *Miller v. Brown* (1882) 3 Ont. 210; *Graham v. Ross* (1883) 3 Ont. 154.

(*x*) *LeTarge v. DeTuyl* (1852) 3 Gr. 595; *Livingston v. Wood* (1880) 27 Gr. 515; *England v. Codrington* (1758) 1 Eden 169; *Douglass v. Culverwell* (1862) 4 DeG. F. & J. 20; *National Bank of Australasia v. United Hand-in-Hand etc. Co.* (1879) 4 App. Cas. 391.

(*y*) *West v. Jones* (1851) 1 Sim. N.S. 205.

(*z*) *Hodges v. Croydon Canal Co.* (1840) 3 Beav. 86; *Cotterell v. Stratton* (1872) 8 Ch. 295; *Cottrell v. Finney* (1874) L.R. 9 Ch. 541; *In re Watts, Smith v. Watts* (1882) 22 Ch. D. 5; *Stone v. Lickorish* [1891] 2 Ch. 363. In New Brunswick it has been held that a mortgagee will not be deprived of his costs in a suit for redemption made necessary by a dispute as to the rate of interest to which he is entitled; *Thomas v. Girvan* (1897) 1 N.B. Eq. 314.

(*a*) *Little v. Brunker* (1880) 28 Gr. 191.

And a claim by a mortgagee to consolidate securities which is not allowed is not misconduct so as to disentitle him to costs (b).

Claim to consolidate securities.

But where the mortgagor made a definite offer to redeem and the mortgagee unreasonably refused the offer setting up a groundless claim to consolidate another mortgage, it was held that as the mortgagee's refusal was the sole cause of the litigation he must pay to the mortgagor the costs of the action (c).

If the mortgage debt has been paid off before action, or if the amount due is tendered by the mortgagor or by anyone representing him or by a subsequent incumbrancer, and the mortgagee refuses the tender or proceeds after payment, he will be liable for the costs (d).

Mortgage debt paid before action.

Tender.

A mere offer to pay the amount due and costs without an actual tender will not be sufficient (e).

Offer to pay not sufficient

The conduct of the mortgagee may, however, amount to a dispensing with the tender. Thus if the mortgagee by claiming too much or by setting up two different claims, one of which is wrongful, so conducts himself as to show that a tender of the proper amount would not be accepted this will be a dispensation. But a mere claim by the mortgagee of more than is due will not excuse the tender.

Tender may be dispensed with.

Where the mortgagees refused to assign their mortgage under the *Act respecting Mortgages of Real Estate* (f) to the nominee of the mortgagor on the ground that subsequent mortgagees had not assented, and an application was made

(b) *Stark v. Reid* (1895) 26 Ont. 257; see *Bird v. Wenn* (1886) 33 Ch. D. 215.

(c) *Squire v. Pardoe* (1891) 66 L.T. 243, C.A.

(d) *Roberts v. Williams* (1844) 4 Ha. 129; *Wilson v. Cluer* (1841) 4 Beav. 214; *Shuttleworth v. Lowther* (1802) 7 Ves. 586; *Harmer v. Priestley* (1853) 16 Beav. 569; *Hosken v. Sincock* (1865) 34 L.J. Ch. 435; *Ashworth v. Lord* (1887) 36 Ch. D. 545; *Bank of New South Wales v. O'Connor* (1889) 14 App. Cas. 273; *Greenwood v. Sutcliffe* [1892] 1 Ch. 1.

(e) *Gammon v. Stone* (1749) 1 Ves. Sen. 339; but see *Sentance v. Porter* (1849) 7 Ha. 426.

(f) R.S.O. (1887) c. 102, s. 2; now R.S.O. (1897) c. 121, s. 2.

to the court for an order requiring the mortgagees to execute an assignment, the mortgagees were required to pay the costs occasioned by their refusal (g).

Master may report circumstances affecting costs.

Jurisdiction of County Courts; costs on lower scale.

Under a judgment or order of reference the Master has power to report special circumstances (h); and if the plaintiff in a redemption action claims that the mortgagee has disentitled himself or made himself liable to costs, the disposition of the costs may be reserved until after the Master has made his report. The Master should report any matter bearing on the question of costs (i).

Prior to the *Law Reform Act, 1868* (j), County Courts exercised jurisdiction in the following cases:—(a) where a legal or equitable mortgagee whose mortgage had been created by some instrument in writing sought foreclosure or sale, and the sum claimed as due did not exceed \$200; (b) where a person entitled to redeem a legal or equitable mortgage sought redemption, and the sum actually remaining due did not exceed \$200; (c) where any person sought equitable relief for, or by reason of any matter whatsoever and the subject matter involved did not exceed \$200 (k).

The *Law Reform Act of 1868* (l) abolished the equitable jurisdiction of the County Courts but the Rules of Practice (m) provided a lower scale of costs for actions in the High Court wherein the relief mentioned in the preceding paragraph was sought.

(g) *Queen's College v. Claxton* (1894) 25 Ont. 282.

(h) Ont. Rule 667.

(i) *Simpson v. Horne* (1880) 28 Gr. 1; *Hayes v. Hayes* (1831) 29 Gr. 90.

(j) 32 Vict. (Ont.) c. 6.

(k) C.S.U.C. (1859) c. 15, s. 34, sub-ss. 6, 7, 8. Section 34 of the Act required that the claim for equitable relief should be entered in the County Court of the county in which the defendant resided. And where several defendants resided in different counties the plaintiff under the former practice was entitled to costs on the higher scale: *Re Lyons* (1884) 10 P.R. 150.

(l) 32 Vict. (Ont.) c. 6.

(m) Rule 515 Ont. Jud. Act, 1881; Rule 1219 Con. Rules, 1888.

The equitable jurisdiction of the County Courts was restored by the *County Courts Act, 1896* (*n*).

Section 23 of the *County Courts Act* (*o*) provides that County Courts shall have jurisdiction—

(1) In all causes and actions relating to debt, covenant and contract, to \$600, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant;

(2) In actions by a legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed \$200;

(3) In actions by a person entitled to redeem any legal or equitable mortgage or any charge or lien, and seeking to redeem the same, where the sum actually remaining due does not exceed \$200.

(4) In actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject matter involved does not exceed \$200.

And the County Courts have power as regards actions within their jurisdiction to grant the same relief, redress or remedy as may be granted by the High Court (*p*).

Where an action of the proper competence of a County Court is brought in the High Court, and the judge makes no order to the contrary, the plaintiff is entitled to recover only County Court costs, and the defendant is entitled to tax his costs as between solicitor and client and to set off the excess, if any (*q*).

County
Court action
brought in
High Court.

Where the amount due the plaintiff as mortgagee is less than \$200, but there is a subsequent incumbrance to

(*n*) 59 Viet. (Ont.) c. 19; see now R.S.O. (1897) c. 55.

(*o*) R.S.O. (1897) c. 55.

(*p*) s. 28.

(*q*) Ont. Rule 1132.

whom more than that sum is due, the action will be brought properly in the High Court (*r*).

Where a mortgagee exercised his power of sale realizing \$350, and it was found on a bill filed by the mortgagor for an account that the amount coming to the mortgagor was \$139, it was held that the mortgagor was entitled to costs on the higher scale "the subject matter involved" being \$350 (*s*).

The mortgagees after the exercise of the power of sale in their mortgage, which was security for \$6705, claimed that \$182.61 was still due to them, but on an account being taken it was found that \$20.07 was due to the mortgagor. It was held that the amount involved consisted of the two last mentioned sums or a total of \$202.68 and that the costs were properly taxed on the higher scale (*t*).

Action for
account
after sale.

In *Boulton v. Rowland* (*u*) the mortgagee sold under his power of sale for \$5517 the whole of which he claimed to be entitled to keep. The mortgagor brought action for an account and for payment of the surplus, and it was found on a reference that a sum of \$136 was due to the mortgagor. It was held that the general rule that a mortgagee is entitled to his costs did not apply, this not being a foreclosure or redemption suit but the case of a defendant receiving money for the plaintiff and being sued therefor, and the mortgagor was declared entitled to his full costs of suit.

Solicitor
mortgagee
not entitled
to profit
costs.

Where a mortgagee is a solicitor he will not be allowed profit costs, but only costs out of pocket, in respect of any legal proceedings taken by him to recover the mortgage

(*r*) *Hyman v. Roots* (1865) 11 Gr. 202; *Seath v. McIlroy* (1867) 2 Ch. 93.

(*s*) *McGillicuddy v. Griffin* (1873) 20 Gr. 81.

(*t*) *Morton v. Hamilton Provident and Loan Society* (1885) 10 P.R. 636; affirmed 11 P.R. 82.

(*u*) (1883) 4 Ont. 720; *Beatty v. O'Connor* (1884) 5 Ont. 747.

debt (*v*). But a solicitor acting for himself and a co-mortgagee who is not a solicitor is entitled to profit costs (*w*).

Where the legal proceedings are taken by the firm of which the solicitor mortgagee is a member, his partners will be entitled to the same share of such profit costs as they are entitled to in the general profits of the partnership business (*x*).

It would seem that a covenant in the mortgage deed to pay profit costs to a solicitor mortgagee would be void as being a contract for a collateral advantage beyond the principal and interest, and the costs to which a solicitor mortgagee is ordinarily entitled (*y*). In England by the *Mortgagors' Legal Costs Act, 1895* (58 and 59 Vict. Imp. chapter 25) a solicitor who is a mortgagee either alone or jointly with any other person is now entitled to profit costs.

Under the *Act respecting Mortgages of Real Estate* (*z*) the mortgagee's costs may, without an order, be taxed by one of the taxing officers of the Supreme Court of Judicature, or by the local Master, at the instance of any party interested. Provision is also made by the *Act respecting Solicitors* (*a*) for the taxation of the bill of the mortgagee's solicitor. Section 45 of that act is as follows:—

Taxation of
mortgagee's
costs.

45. Where any person not being chargeable as the principal party is liable to pay or has paid any bill either to the solicitor, his assignee, or representative, or to the principal party entitled thereto, the person so paying, his assignee or representative, may make the like application for a reference thereof to taxation as the party chargeable therewith might himself have made, and in like manner, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.

(*v*) *In re Wallis, ex parte Lickorish* (1890) 25 Q.B.D. 176; *Eyre v. Wynn-Mackenzie* [1894] 1 Ch. 218; *Stone v. Lickorish* [1891] 2 Ch. 363.

(*w*) *Selater v. Cottam* (1857) 3 Jur. N.S. 630; *In re Doody, Hibbert v. Lloyd* [1893] 1 Ch. 129.

(*x*) *In re Doody, Fisher v. Doody* [1893] 11 Ch. 129; *Wellby v. Still* [1893] W.N. 91; *Eyre v. Wynn-Mackenzie* [1894] 1 Ch. 218.

(*y*) See *Broad v. Selfe* [(1863) 11 W.R. 1036; *Eyre v. Wynn-Mackenzie* [1894] 1 Ch. 218.]

(*z*) R.S.O. (1897) c. 121, s. 30.

(*a*) R.S.O. (1897) c. 174.

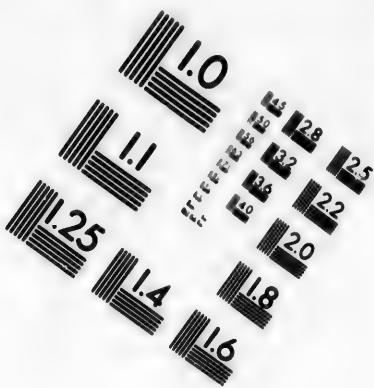
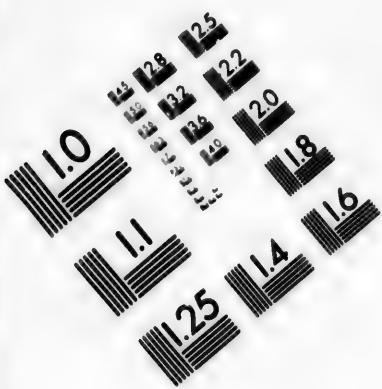
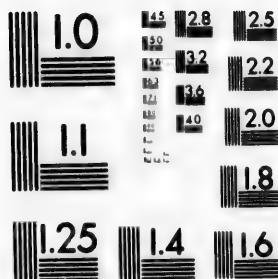
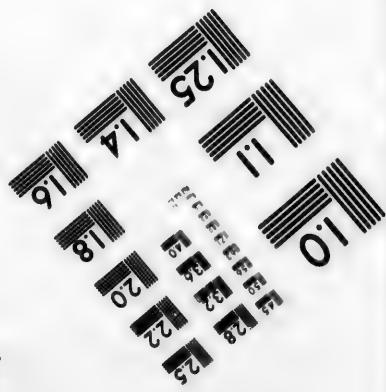


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A mortgagor is a third party within the act so as to entitle him to have the mortgagee's costs taxed (b).

Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power, such costs to be taxed as between solicitor and client (c).

But if the mortgagee has paid his solicitor's costs and so precluded himself from taxing the bill, the mortgagor who stands simply in the place of the mortgagee has no right to tax the costs. If the mortgagee has paid the solicitor more than the proper costs the mortgagor's only remedy is against the mortgagee for an account (d).

Taxation
under
præcipe
order.

Where the retainer of the solicitor is not disputed and there are no special circumstances an order may be obtained on *præcipe* for the delivery and taxation of the mortgagee's costs (e). But a person obtaining delivery of a bill on a *præcipe* order has not necessarily a right to tax it, and the *præcipe* order may be set aside if at the time of making it there were matters in dispute which affected the right to obtain a *præcipe* order. The applicant for a *præcipe* order takes it at his own risk (f).

(b) *Ex parte Glass, re Macdonald* (1863) 3 P.R. 138.

(c) *Re Crevar & Muir* (1879) 8 P.R. 56; *Re O'Donohoe* (1868) 4 P.R. 266; *In re Jessop* (1863) 32 Beav. 406.

(d) *Re McDonald, McDonald & Marsh* (1879) 8 P.R. 88; *Re Cronyn, Kew & Betts* (1880) 8 P.R. 372; *Re Massey* (1865) 34 Beav. 463; but see section 49 of the *Act respecting Solicitors*, R.S.O. (1897) c. 174:-49. The payment of any such bill as aforesaid shall in no case preclude the Court or Judge to whom application is made from referring such bill for taxation, if the application is made within twelve months after payment, and if the special circumstances of the case in the opinion of the Court or Judge appear to require the same, upon such terms and subject to such directions as to the Court or Judge seem right.

(e) Ont. Rule 1184.

(f) *Re Moffatt* (1887) 12 P.R. 240.

CHAPTER XIX.

PRIORITIES.

Where there are two or more persons having mortgages or incumbrances on the same estate the question arises whether they shall be paid *pari passu*, or whether one shall be entitled to resort to the lands and be paid in full before the others shall have anything. Apart from statutory provision the general rule is that he whose security is created first in the order of time shall be entitled to be paid out of the lands in priority to those whose securities are later; *qui prior est tempore potior est jure*.

But incumbrances which consist of taxes or rates assessed upon lands under the authority of the *Assessment Act* (a), the *Municipal Act* (b), or the *Municipal Drainage Act* (c) have priority over other incumbrances including mortgages.

Section 149 of the *Assessment Act* provides that—

149. The taxes accrued on any land shall be a special lien on such land, which lien shall have preference over any claim, privilege, lien or incumbrance of any party except the Crown, and shall not require registration to preserve it (d).

If lands are mortgaged to the Crown, the mortgage takes precedence to the lien for taxes, and the interest of the Crown cannot be sold for arrears of taxes (dd).

The lien for taxes takes precedence although the assessment be made after the creation of other charges, and

Interest of
Crown takes
priority over
lien for taxes

(a) R.S.O. (1897) c. 224.

(b) E.S.O. (1897) c. 223.

(c) R.S.O. (1897) c. 226.

(d) See *Haynes v. Smith* (1853) 11 U.C.R. 57; see also R.S.O. (1897) c. 223, s. 387.

(dd) *Regina v. County of Wellington* (1889) 17 Ont. 615; 17 Ont. App. 421; *sub nom. Quirt v. Queen* (1891) 19 S.C.R. 510.

such a lien attaches in preference to a mortgage given before the act was passed under the authority of which the assessment is made (e).

Mechanics' liens.

Under section 7 of the *Mechanics' and Wage-Earners' Lien Act* (f) the lien given to workmen and others for work done and materials supplied shall have preference over a prior mortgage or other charge to the extent to which the selling value of the land is increased by the work done or materials supplied (g). But a lienholder is not entitled to the benefit of insurance effected by the mortgagee, and if the buildings in respect of which the lien has been allowed are destroyed by fire the lien is at an end (h).

In addition to the priority to which the holder of a mechanic's lien is entitled over prior mortgagees, he may acquire priority over subsequent mortgagees by prior registration of his lien. A mortgagee who takes his mortgage after the work or material is supplied, but without notice of the lien, and registers the mortgage before the lien is registered, takes priority over the lienholder (i).

Executions.

As among those whose incumbrances are executions against the lands the rule of priority has been modified by the *Creditors' Relief Act* (j), and subject to its provisions moneys levied under executions shall be distributed rateably (k). But an execution creditor who directs the sheriff to stay proceedings may lose his priority over

(e) *O'Brien v. Cogswell* (1890) 17 S.C.R. 420.

(f) R.S.O. (1897) c. 153.

(g) *Dufton v. Horning* (1895) 26 Ont. 252.

(h) *Patrik v. Walbourne* (1896) 27 Ont. 221.

(i) *Richards v. Chamberlain* (1878) 25 Gr. 402; *Hynes v. Smith* (1879) 27 Gr. 150; *McVean v. Tiffin* (1885) 13 Ont. App. 1, overruling *Makins v. Robinson* (1884) 6 Ont. 1; *Reinhart v. Shatt* (1888) 15 Ont. 325; *Re Craig* (1883) 3 C.L.T. 501; *Wanty v. Robins* (1888) 15 Ont. 474.

(j) R.S.O. (1897) c. 78, as amended by 62 Vict. (2) (1899) (Ont.), c. 11, s. 13.

(k) *Harvey v. McNeil* (1888) 12 P.R. 362; 24 C.L.J. 122.

subsequent execution creditors in cases not provided for by the *Creditors' Relief Act* so long as the stay continues (*l*).

As between a mortgagee and an execution creditor of the mortgagor the rule of priority applies (*m*).

The lien of an execution creditor against lands arises the moment a writ of execution against lands is delivered to the sheriff of the county or district within which the lands lie (*n*).

When two instruments are executed on the same day that which was executed first takes priority, and evidence may be given to ascertain which was in fact executed first (*o*).

Apart from the provisions of the *Registry Act* (*p*) the rule of priority applies to equitable mortgagees as among themselves, and also to equitable mortgagees and execution creditors and those having an equitable lien, charge or interest; but a mortgagee who is the holder of the legal estate has priority over all equitable mortgagees and lien-holders, of whose claims he has no notice at the time of the creation of his security.

But where a legal mortgagee is guilty of fraud or even gross negligence, for example, in not requiring the production of title deeds, he will not be entitled to priority over a prior equitable mortgagee whose mortgage was created by deposit of title deeds (*q*).

Under the provisions of the *Registry Act* a mortgagee may lose the priority which he has acquired by virtue of his being the holder of the legal estate, or by virtue of his security being prior in point of time.

Priority
where instru-
ments exe-
cuted on
same day.

Equitable
mortgagee.

Legal
mortgagee.

Mortgagee
may lose his
priority.

(*l*) *Foster v. Smith* (1856) 13 U.C.R. 243; *Bank of Montreal v. Munro* (1864) 23 U.C.R. 414; *Kerr v. Kinsey* (1865) 15 U.C.C.P. 531.

(*m*) 62 Vict. (2) (1899) (Ont.) c. 11, s. 13.

(*n*) *Beekman v. Jarvis* (1847) 3 U.C.R. 280; *Converse v. Michie* (1865) 16 U.C.C.P. 167.

(*o*) *Gartside v. Silkstone etc. Coal and Iron Company* (1882) 21 Ch. D. 762.

(*p*) R.S.O. (1897) c. 136.

(*q*) *Oliver v. Hinton* [1899] 2 Ch. 264; *Ratcliff v. Barnard* (1871) 6 Ch. 652.

Registration

The *Registry Act* (r) provides for the registration of certain instruments affecting lands in the county or registry division in which the lands lie.

**Instruments
which may
be registered**

Subject to the provisions of section 39 as to leases for a term not exceeding seven years instruments which may be registered are as follows:—

Every Crown grant, Order in Council of the Dominion or of this Province, deed, conveyance, mortgage, assignment of mortgage, certificate of discharge of mortgage, assurance, lease, bond, release, discharge, power of attorney, or substitution thereof, under which any such deed, conveyance, assurance, discharge of mortgage or other instrument is executed, bonds or agreements for sale or purchase of land, letter of attorney, will, probate of will, grant of administration, municipal road by-law, certificate of any proceedings in any court, judgment of foreclosure, and every other certificate of judgment of any court affecting any interest in or title to land; also, certificates of payment of taxes, granted under the corporate seal of the county, city or town by the treasurer; every sheriff's and treasurer's deed of lands sold by virtue of his office; every contract in writing; every commission and proceeding in lunacy, bankruptcy and insolvency; and every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered or affected in any wise, affecting land in Ontario (s).

**Unregistered
instrument
fraudulent
and void
as against
subsequent
purchaser
or mortgagee**

Section 87 of the *Registry Act* provides as follows:—

87. After any grant from the Crown of lands in Ontario, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims.

So that a mortgagee, legal or equitable, may lose his priority by failure to register, if a subsequent purchaser

(r) R.S.O. (1897) c. 136.

(s) R.S.O. (1897) c. 136, s. 2, sub-s. 1 and s. 38.

or mortgagee registers his instrument without actual notice of the prior mortgage.

The omission of the registrar to index a registered mortgage will not deprive it of priority (*t*). And by section 92 of the *Registry Act* registration shall constitute notice notwithstanding any defect in the proof for registration. Omission of registrar.

An action will lie against a registrar by any person suffering damage owing to the registrar's omission or wrongful act (*u*).

Before the passing of the *Registry Act, 1893* (*uu*), there was great inconvenience owing to the difficulty in determining the precise point of time when registration took place. For if before registration there should be actual notice of a prior instrument the subsequent registration would not prevail against the prior instrument. In one case it was held that entry of the instrument in the registry books at full length was necessary to constitute registration and that the mere receipt of the instrument by the registrar was not sufficient (*v*). What constitutes registration.

The notice required by the *Registry Act* in order to preserve the priority of a mortgage over a subsequent instrument must be actual not merely constructive notice (*vv*), and will be sufficient if it comes to the subsequent purchaser or mortgagee at any time before the registration of his instrument (*w*). Notice must be actual.

(*t*) *Lavrie v. Rathbun* (1879) 38 U.C.R. 255; *Green v. Ponton* (1885) 8 Ont. 471; *Jost v. McCuish* (1893) 25 N.S.R. 519.

(*u*) *Harrison v. Brega* (1861) 20 U.C.R. 324; *Green v. Ponton* (1885) 8 Ont. 471; *Brega v. Dickey* (1869) 16 Gr. 494; *Ontario Industrial Loan etc. Co. v. Lindsey* (1884) 4 Ont. 473.

(*uu*) 56 Viet. (Ont.) e. 21, s. 93.

(*v*) *Lavrie v. Rathbun* (1876) 38 U.C.R. 255.

(*vv*) *Cochrane v. Johnston* (1867) 14 Gr. 177; *Harty v. Appleby* (1872) 19 Gr. 205; *Sherboneau v. Jeffs* (1869) 15 Gr. 574; *Grey v. Ball* (1876) 23 Gr. 390; *Roe v. Braden* (1877) 24 Gr. 589.

(*w*) *Millar v. Smith* (1873) 23 U.C.C.P. 47.

Instrument
is registered
when
received by
registrar.

The question was set at rest by the act above referred to, which provided that an instrument should be deemed to be registered when received by the registrar or his clerk at his office during office hours. These provisions are now contained in section 96 of the *Registry Act* (*ww*) :—

96. Every instrument capable of registration and having the proper affidavit of execution attached thereto, shall be deemed to be registered when and so soon as the same is delivered either personally or by letter to and received at his office during office hours by the Registrar or some officer or clerk in his office on his behalf, and a tender or payment made of the proper fees therefor, and thereafter no alteration shall be made by any person whatever in such instrument, and any person altering the same shall be deemed to be guilty of the violation provided for by the preceding section, and may be punished in the manner therein provided.

Execution
creditor.

An execution creditor who places his writ of execution in the sheriff's hands after the mortgage has been made, but prior to the registration thereof, does not thereby gain priority (*x*). Nor can an execution creditor obtain priority over the holder of a prior equitable claim which is unregistered or is not registered until after the writ of execution has been placed in the sheriff's hands (*y*).

Purchaser at
sheriff's sale.

A purchaser of lands sold by a sheriff under an execution may gain priority by registration of his deed over a mortgage made before the sale but unregistered (*z*).

Mortgagee
may preserve
his priority
by notice.

A mortgagee may preserve his priority by giving notice of his claim to those subsequently dealing with the lands. The notice may be either actual notice before registration of the subsequent instruments, or notice by the registration of the mortgage. Section 92 of the *Registry Act* (*c*) declares that registration shall constitute notice to all persons

(*ww*) R.S.O. (1897) c. 136.

(*x*) *Russell v. Russell* (1881) 28 Gr. 419.

(*y*) *Hamilton Provident and Loan Society v. Gilbert* (1884) 6 Ont. 434; *Brown v. McLean* (1889) 18 Ont. 533; *Re Trusts Corporation and Boehmer* (1894) 26 Ont. 191; *Re Lewis and Thorne* (1887) 14 Ont. 133; *Parke v. Riley* (1866) 3 E. & A. 215.

(*z*) *Van Wagner v. Findlay* (1867) 14 Gr. 53.

(*c*) R.S.O. (1897) c. 136.

claiming any interest in the lands subsequent to such registration. Section 92 is as follows:—

92. The registration of any instrument under this Act, or any former Act, shall constitute notice of the instrument to all persons claiming any interest in the lands, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every Registrar not to register any instrument, except on such proof as is required by this Act.

Registration of a mortgage on lands, before issue of the patent from the Crown, does not constitute notice to a person who afterwards obtains the patent without actual notice of the mortgage (d).

Although a mortgagee may under the provisions of the act lose the priority to which he would otherwise be entitled, he may, by virtue of the act, gain priority to which he would not be entitled apart from the act. If he registers his mortgage before receiving actual notice of prior unregistered instruments he will be entitled to priority over them by virtue of section 87, which declares that such prior unregistered instruments as against him shall be fraudulent and void, and also by virtue of section 97 which provides as follows:—

97. Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration.

An equitable sub-mortgagee by deposit made by a legal mortgagee of land has an equitable estate in land, and, therefore, as between two such equitable sub-mortgagors, the doctrine of obtaining priority by notice does not prevail. Thus the equitable sub-mortgagee who is later in time does not obtain priority over the earlier by being the first to give notice to the original mortgagor (e).

Priority of registration, however, may not prevail. A mortgage prior as to execution and registration may be postponed to a mortgage made and registered subsequently

(d) *Re Reed v. Wilson* (1893) 23 Ont. 552.

(e) *Hopkins v. Hemsworth* [1898] 2 Ch. 347; *In re Richards, Humber v. Richards* (1890) 45 Ch. D. 589, considered.

Registration
is notice.

Registration
before issue
of Crown
patent not
notice.

Mortgagee
may gain
priority by
registration.

Priority of
registration
shall prevail.

When
priority of
registration
does not
prevail.

Thus where A. mortgages to B. land which he has agreed to purchase from C. but has not yet purchased, and after registration of the mortgage A. receives a deed of the land from C. and gives a mortgage back to C. for the unpaid purchase money, in that case B's. mortgage although prior in execution and registration is postponed to C's. mortgage. B. under his mortgage takes no estate from A. as A. has none to give, or at most takes an estate by estoppel, and the subsequent conveyance to A. feeds the estoppel only to the extent of A's interest in the land which is that of owner of the equity of redemption; and the *Registry Act* does not apply (f).

New
mortgagee
paying off
prior
mortgage.

Where a subsequent mortgagee advances money for the purpose of paying off a prior mortgage he is entitled to priority over an intervening incumbrancer (g).

But he may be estopped by his conduct from asserting his rights. Thus in *McLeod v. Wadland* (h) the plaintiff paid off a first mortgage on certain lands, and procured its discharge, taking a new mortgage to himself for the amount of the advance in ignorance of the fact that there was a second mortgage. Shortly afterwards on ascertaining this fact he notified the defendant, the holder, that he would pay it off, and the defendant relying on the notice took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought an action to have it declared that he was entitled to stand in the position of first mortgagee; but it was held that the plaintiff by his acts and conduct had precluded himself from asserting such rights (i).

Payment of
prior mort-
gage by
person liable
to pay it.

If a mortgagor, or owner of the equity of redemption or any incumbrancer redeems a prior charge which was his

(f) *Nevitt v. McMurray* (1886) 14 Ont. App. 126; *McMillan v. Munro* (1898) 25 Ont. App. 288.

(g) *Trust and Loan Co. v. Gu'llagher* (1879) 8 P.R. 97.

(h) (1894) 25 Ont. 118.

(i) See also *Brown v. McLean* (1889) 18 Ont. 533; *Abell v. Morrison* (1890) 19 Ont. 669.

own debt, or which by contract express or implied he was bound to discharge, he cannot keep such charge alive as against a mesne incumbrancer, whose incumbrance he is also expressly or impliedly bound to discharge (*j*).

If a person entitled to pay off a mortgage makes payments thereon from time to time he is not entitled to an assignment unless his payments have been made on the faith of his getting an assignment. In any event his right to an assignment is only an equitable right and cannot prevail over the right of a second mortgagee who registers his mortgage without notice of the right (*k*).

Where a widow has not joined in the first mortgage to bar her dower, but joins in the second mortgage for that purpose, and the second mortgagee obtains priority over the first by prior registration, the widow is entitled to the surplus arising from a sale under the second mortgage in priority to the first mortgagee (*l*).

With regard to mortgages and other written instruments capable of registration the statute points out the means of preserving priority, namely, by registration. But in the case of an equitable mortgage or lien incapable of registration, for example, a mortgage by deposit of title deeds without a sufficient memorandum in writing, it is not clear how priority may be preserved. Section 98 of the *Registry Act* provides that—

98. No equitable lien, charge, or interest affecting land shall be deemed valid in any court in this Province as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act.

This section it would seem refers to equities which are incapable of registration; for example, a vendor's lien for

(*j*) *Blake v. Beatty* (1855) 5 Gr. 359.

(*k*) *McMillan v. McMillan* (1894) 21 Ont. App. 343; *Imperial Loan and Investment Co. v. O'Sullivan* (1879) 8 P.R. 162; *Watson v. Dowser* (1881) 28 Gr. 478.

(*l*) *Gray v. Coughlin* (1891) 18 S.C.R. 553, reversing the Court of Appeal for Ontario; S.C. *sub nom. MacLennan v. Gray* (1889) 16 Ont. App. 224.

Right to assignment.

Bar of dower

Equitable mortgages and liens incapable of registration.

unpaid purchase money or an equitable mortgage by deposit of title deeds. Instruments capable of registration are provided for by sections previously referred to. Before the provisions of section 98 were originally enacted by 29 Vict. (1866), chapter 24, it was held that an equitable right or interest incapable of registration was not liable to be defeated by a subsequent registered instrument (*m*). But since that enactment an equitable lien, charge or interest cannot be set up against an instrument which has been registered without notice of the equitable claim. The section if taken literally would seem to avoid all equitable claims irrespective of notice; but it has been held in several cases that a person claiming under a registered instrument takes subject to prior equities of which he has notice (*n*). The notice required must be actual notice (*o*) and possession except in case of a lease is only constructive notice (*p*).

Lis pendens

A mortgagee by deposit of title deeds or other person claiming an equitable lien, charge or interest may not be altogether defeated if he is in a position to institute an action to have his rights declared, for he may then register a certificate of *lis pendens* which will be notice to persons subsequently dealing with the lands (*q*).

Fraud or negligence.

A mortgagee who would otherwise be entitled to priority may forfeit such priority by fraud or negligence, as well as by having notice of the prior equity (*r*).

Misrepresentation or concealment

Misrepresentation or fraudulent concealment of an incumbrance on the part of a mortgagee or even his solicitor or agent, whereby a subsequent incumbrancer or

(*m*) *Moore v. Bank of British North America* (1868) 15 Gr. 308.

(*n*) *Forrester v. Campbell* (1870) 17 Gr. 379; *Wigle v. Stetterington* (1872) 19 Gr. 512; *Peterkin v. McFarlane* (1884) 9 Ont. App. 429; S.C. *sub nom. Rose v. Peterkin* (1885) 13 S.C.R. 677.

(*o*) *Building and Loan Association v. Poaps* (1896) 27 Ont. 470; *Bell v. Walker* (1873) 20 Gr. 558; *Hudson's Bay Co. v. Kearns* (1896) 4 B.C.R. 536.

(*p*) *Cooley v. Smith* (1877) 40 U.C.R. 543.

(*q*) R.S.O. (1897) c. 51, s. 97.

(*r*) *Ibbottson v. Rhodes* (1706) 2 Vern. 554.

purchaser is induced to believe that the property is free from such incumbrance, may postpone the prior security (s).

Where one of two or more tenants in common has been in possession, the other tenants in common cannot charge his share with the excess of rents received by him, in priority to a mortgage of that share (t); nor in priority to an execution creditor of the tenant in possession (u).

Tenants in common.

Where a first mortgagee released to the mortgagor portions of the mortgaged property on which there was a subsequent incumbrance it was held that this did not give priority to the subsequent incumbrancer with respect to the remainder of the property; but that it might render the first mortgagee responsible to the second for the fair value of the parcels released (v).

A lease for a term not exceeding seven years, if possession goes with it, is not within the provisions of the *Registry Act*, and does not require to be registered in order that it may retain its priority.

Lease for 7 years.

Section 39 provides that—

39. This Act shall not extend to any lease for a term not exceeding seven years, where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years.

So that a mortgagee may be postponed to a prior unregistered lease for a term not exceeding seven years even if he has had no notice of the lease. But the section applies only to a lease under which the lessee is in actual possession, and the mortgagee may protect himself by making enquiry of the lessee.

Where a lease made for a term less than seven years contains a covenant for renewal for a further term which together with the original term makes a period exceeding

(s) *Berrisford v. Milward* (1740) 2 Atk. 49; *Stronge v. Hawkes* (1853) 4 DeG. M. & G. 186; *Brown v. Thorpe* (1842) 11 L.J. Ch. 73; 18 R.C. 532.

(t) *Hill v. Hicken* (1897) 77 L.T. 127.

(u) *McPherson v. McPherson* (1883) 10 P.R. 140.

(v) *Trust and Loan Co. v. Boulton* (1871) 18 Gr. 234.

seven years, in that case, if the lessee is in possession, the lease does not require registration in order to be valid as against a mortgage of the land which was registered during the original term (*w*).

But where a lessee during the currency of a lease for five years obtained a lease for a further term of four years to commence on the termination of the first lease, it was held that the second lease being unregistered could not prevail against a mortgage registered after the second lease was made but before possession under it began. In order to obtain the protection of the statute there must be not only a present lease but possession under it (*x*).

Lease by
mortgagor
subsequent
to mortgagee.

A lease granted by a mortgagor after the mortgage is made, without the mortgagee's concurrence, will not bind the mortgagee (*y*).

The general rule of priority as among secured creditors that they shall have resort to the lands in the order of time in which they were created respectively is further modified by the equitable doctrines of tacking and consolidation (*z*).

(*w*) *Latch v. Bright* (1869) 16 Gr. 653.

(*x*) *Davidson v. McKay* (1867) 26 U.C.R. 306.

(*y*) *Keech v. Hall* (1778) Douglas 21; 18 R.C. 123.

(*z*) See Chapters XX. and XXI.

CHAPTER XX.

TACKING.

According to the equitable doctrine of tacking a mortgagee may under certain circumstances tack or add to the amount owing under the mortgage certain other debts or claims owing to him by the mortgagor, and may refuse to be redeemed unless the mortgagor pays the whole amount. This rule is founded on the equitable maxim that he who seeks equity must do equity. When a mortgagor comes into a court of equity seeking redemption the court, acting on this maxim, imposes as a condition of its interference the term that the mortgagor shall act honestly with the mortgagee by paying him not only the mortgage debt, but also other debts owing by the mortgagor to the mortgagee. Thus if a mortgagee lends a further sum to the mortgagor on a judgment or statute, or on a subsequent mortgage, he may require both to be paid before submitting to redemption (a). Doctrine of tacking.

Neither specialty nor simple contract debts can be tacked as against the mortgagor himself (b). Tacking against mortgagor.

But both specialty and simple contract debts can be tacked as against the heir or devisee redeeming (c); and a mortgagee of a term can tack simple contract debts as against the executor redeeming (d). Tacking against heir or executor.

(a) *Shepherd v. Titley* (1742) 2 Atk. 348; *Wyllie v. Pollen* (1863) 11 W. R. 1081.

(b) *Jones v. Smith* (1794) 2 Ves. 372; *DeVigier v. Lee* (1843) 2 Ha. 326; *Ferguson v. Frontenac* (1874) 21 Gr. 188; *Canadian Bank of Commerce v. Forbes* (1885) 10 P.R. 442.

(c) *Elvy v. Norwood* (1852) 21 L.J. Ch. 716; *Trust and Loan Co. v. Cuthbert* (1868) 14 Gr. 410; *Watkins v. McKellar* (1859) 7 Gr. 584; *Teeter v. St. John* (1863) 10 Gr. 85; *Wells v. Trust and Loan Co.* (1884) 9 Ont. 170; 20 C.L.J. 407.

(d) *Coleman v. Winch* (1721) 1 P. Wms. 775.

Tacking costs.

Tacking judgment.

Moneys paid for release of equity of redemption.

No tacking of unsecured debts against the mortgagor.

Tacking arises only where charges created by same person.

A mortgagee is not entitled to tack to his mortgage debt the costs of unsuccessful proceedings taken without the concurrence of the mortgagor (*e*).

In *McLaren v. Fraser* (*f*) a mortgagor's devisee was held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the *Registry Act* forbids.

Where a mortgagor conveyed his equity of redemption to a third party, and afterwards contracted to release to the mortgagee, and the latter, without notice of the prior conveyance, paid the mortgagor some part of the consideration that he had contracted to give for the release, it was held that he was entitled to tack what he had so paid to his mortgage debt (*g*).

And so where a testator devised his lands for payment of debts simple contract debts could be tacked as against the heir or devisee redeeming (*h*). But there could be no tacking of an unsecured debt as against the assignee of the equity of redemption or to the prejudice of creditors having debts of equal degree (*i*). Nor could a mortgagee in an action against him to recover the surplus proceeds of sale set-off debts due to him from the mortgagor if the effect was to give him a preference over other creditors of the mortgagor (*j*).

The right of tacking obtains only where the mortgages or charges sought to be tacked are created by, or arise against the same person. Thus a first mortgagee cannot as against the first mortgagor who seeks to redeem tack to

(*e*) *Wells v. Trust and Loan Co.* (1884) 9 Ont. 170; 20 C.L.J. 407.

(*f*) (1870) 17 Gr. 533.

(*g*) *Gordon v. Lothian* (1851) 2 Gr. 293.

(*h*) *Rolfe v. Chester* (1855) 20 Beav. 610.

(*i*) *Richardson v. Horton* (1843) 7 Beav. 112; *Irby v. Irby* (1855) 22 Beav. 217.

(*j*) *Talbot v. Frere* (1878) 9 Ch. D. 568; *In re Gregson, Christison v. Bolam* (1887) 36 Ch. D. 223.

the first mortgage a second mortgage on the same property, made after the mortgagor has parted with the equity of redemption (*k*).

The right of the mortgagee to tack as against the mortgagor and his representatives is not of great importance, as the only practical effect of it is to prevent circuity of action. Tacking is of more importance and is more frequently challenged, when the assertion of the right involves a question of priority between the mortgagee and a subsequent incumbrancer; for example, where a mortgagee advances part of the mortgage money and seeks to tack further advances made after a second mortgage has been given, or where a mortgagee who is the holder of the legal estate acquires a third mortgage without notice of a second mortgage and asserts the right to tack as against the intervening incumbrancer.

The general rule of equity, with regard to the priorities of equitable incumbrancers as among themselves, is that they rank in priority of date: *qui prior est tempore potior est jure*. But as between a person holding the legal title and a person having an equitable title the general rule is that the legal title prevails (*l*). Where a legal mortgagee seeks to tack a subsequent charge as against a mesne incumbrancer the rule of priority may be stated thus:—The possession or acquisition of the legal estate by a mortgagee entitles him to priority in respect of a separate equitable charge in his favour upon the same property, so as to postpone the securities of intermediate incumbrancers (*m*).

An equitable mortgage or incumbrance cannot be tacked to another equitable mortgage so as to acquire

Tacking as
between
incumbran-
cers.

Priorities :
legal and
equitable in-
cumbrances.

(*k*) *Stark v. Reid* (1895) 26 Ont. 257.

(*l*) *Bristol v. Hungerford* (1705) 2 Vern. 524; *Bailey v. Barnes* [1894] 1 Ch. 25.

(*m*) *Marsh v. Lee* (1670) 2 Ventr. 337; 18 R.C. 523.

No tacking unless subsequent advance a lien on the land.

priority over an intervening incumbrance unless it be by virtue of prior registration (*n*).

Tacking will not be allowed as against a mesne incumbrancer unless the subsequent advance sought to be tacked is made on the security of the land (*o*).

The right to tack will not be allowed as against a mesne incumbrancer if the person asserting the right has had notice of the mesne incumbrance at the time of advancing his money (*p*).

Foundation of the rule.

The rule is based on the maxim that "where the equities are equal the law shall prevail", and forms an exception to the rule of equity that equitable incumbrancers as between themselves shall rank in the order of time.

Mortgagee having or acquiring the legal estate.

A mortgagee who originally holds or afterwards acquires the legal estate prevails over all other persons having mortgages, charges or other incumbrances of which he had no notice at the time when he advanced his money (*q*). If a mortgagee has no notice at the time of advancing his money he may protect his security by subsequently getting in the legal estate, even although at the time when he gets it in he has notice of the mesne incumbrance (*r*).

Tacking not allowed against the provisions of the Registry Act

But the mesne incumbrancer may be protected by registration of his mortgage under the *Registry Act* (*s*). For registration is notice to all persons claiming any interest in the lands subsequent thereto (*t*).

(*n*) *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 490; R.S.O. (1897) c. 136, ss. 87, 92, 97.

(*o*) *Lacey v. Ingle* (1847) 2 Ph. 413; *Godfrey v. Tucker* (1863) 33 Beav. 280.

(*p*) *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 490.

(*q*) *Goodtitle v. Morgan* (1787) 1 T.R. 755; *Right v. Bucknell* (1831) 2 B. & Ad. 278; 36 R.R. 563; *Bates v. Brothers* (1855) 2 Sm. & G. 509.

(*r*) *Blackwood v. London Chartered Bank of Australia* (1874) L.R. 5 P.C. 92; 18 R.C. 522.

(*s*) R.S.O. (1897) c. 136.

(*t*) s. 92.

Section 98 of the *Registry Act* is as follows:—

98. No equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act.

Where a mortgagee has advanced part of the mortgage moneys he may tack to his original advance subsequent advances not exceeding in all the amount for which the mortgage is expressed to be a security, in priority to a subsequent mortgage of which he has no actual notice at the time of such subsequent advances. In such a case the subsequent mortgagee may preserve his priority by giving the first mortgagee actual notice of his claim; registration of his mortgage is not sufficient to constitute actual notice (*u*).

Further advances.

A legal mortgagee cannot claim priority over a subsequent mortgagee in respect of any further advances made by him as first mortgagee after he has received notice of the subsequent mortgage (*v*).

No tacking of further advances after notice of subsequent mortgage.

Registration of the subsequent mortgage does not constitute notice to the first mortgagee so as to give priority to the subsequent mortgage over advances made after the registration. The notice must be actual notice (*w*).

Section 99 of the *Registry Act* (*x*) provides as follows:—

99. (1) Every mortgage duly registered against the lands comprised therein is, and shall be deemed as against the mortgagor, his heirs, executors, administrators, assigns and every other person claiming by, through or under him, to be a security upon such lands to the extent of the money or money's worth actually advanced or supplied to the mortgagor under the said mortgage (not exceeding the amount for which such mortgage is expressed to be a security) notwithstanding that the said moneys or money's worth, or some part thereof, were

(*u*) R.S.O. (1897) c. 136, s. 99; *Pierce v. Canada Permanent Loan and Savings Co.* (1894) 25 Ont. 671; 23 Ont. App. 516.

(*v*) *Hopkinson v. Rolt* (1861) 9 H.L.C. 514; *London and County Banking Co. v. Ratcliffe* (1881) 6 App. Cas. 722; *Union Bank of Scotland v. National Bank of Scotland* (1886) 12 App. Cas. 53.

(*w*) *Pierce v. Canada Permanent Loan and Savings Co.* (1894) 25 Ont. 671; 23 Ont. App. 516.

(*x*) R.S.O. 1897, c. 136.

advanced or supplied after the registration of any conveyance, mortgage, or other instrument affecting the said mortgaged lands, executed by the mortgagor or his heirs, executors or administrators, and registered subsequently to such first mentioned mortgage, unless before advancing or supplying such moneys or money's worth the mortgagee in such first mentioned mortgage had actual notice of the execution and registration of such conveyance, mortgage, or other instrument; and the registration of such conveyance, mortgage or other instrument after the registration of such first mentioned mortgage, shall not constitute actual notice to such mortgagee of such conveyance, mortgage or other instrument.

(2) This section shall not apply to any action pending on the 5th day of May, 1894, and shall not affect any question of priority in respect of advances made by a mortgagee before the said date.

Covenant
for further
advances.

The doctrine of *Hopkinson v. Rolt* (y) that, after notice of a subsequent incumbrance, a first mortgagee cannot, as against that incumbrancer, tack to his debt further advances made by him to the mortgagor, applies to further advances made in pursuance of an obligation or covenant on the part of the first mortgagee entered into at the time of the first mortgage (z).

In *West v. Williams* (a) Lindley, M.R. said:—

"When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first. Nor can any one who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. On the other hand, the first mortgagee has no right to restrain the mortgagor from borrowing money from some one else, and from giving him a second mortgage, subject to the first. Even if the first mortgagee has agreed to no further advances on the property mortgaged to him, the mortgagor is under no obligation to take further advances from him and from no one else, and if the mortgagor chooses to borrow money from someone else, and to give him a second mortgage, the mortgagor thereby releases the first mortgagee from his obligation to make further advances. Whatever prevents the mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them. A plea of exoneration and discharge before breach would be a good defence at law to an action by the mortgagor against the first mortgagee for not making further advances. If, notwithstanding his release, the first mortgagee makes further advances, with notice of a second mortgage, he is in no better position than any one else who does the like (b)."

(y) (1861) 9 H.L.C. 514.

(z) *West v. Williams* [1899] 1 Ch. 132, C.A.

(a) [1899] 1 Ch. 132, at p. 143

(b) *West v. Williams* [1899] 1 Ch. 132, at p. 143.

CHAPTER XXI.

CONSOLIDATION.

If two or more distinct mortgages of different estates are vested in the same person or if a mortgage is made of one estate, and afterwards a mortgage is made of another estate to secure the same sum with further advances, the mortgagee or his transferee, so long as both securities are subsisting, may insist that all the mortgages shall be redeemed together (a). Mortgages on separate properties made by one mortgagor stand as an entire security to the mortgagee who has a right in equity to compel the mortgagor to redeem all the mortgages if he seeks to redeem one of them.

Doctrine of
consolidation.

In *Jennings v. Jordan* (b) Lord Selborne stated the rule thus :—

"A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable not by express contract but only by virtue of the right which (in English jurisprudence) is called "equity of redemption," may within certain limits and against certain persons (entitled to redeem all or some of them) "consolidate" them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all."

But consolidation must not be confounded with tacking. The right to tack arises only when there are successive mortgages of the same estate; the right to consolidate arises where there are separate mortgages on different estates.

Consolidation differs from tacking

Tacking shall not be allowed to prevail against the provisions of the *Registry Act* (c), but the right to consolidate is not directly affected by the act.

(a) *Pledge v. White* [1896] A.C. 187; 18 R.C. 264.

(b) (1881) 6 App. Cas. 698, at p. 700.

(c) R.S.O. (1897) c. 136, s. 98.

On the argument in *Dominion Savings & Investment Society of London v. Kittridge* (d) the two rights were confused, and an attempt was made to apply to consolidation the provisions of the *Registry Act* against tacking. It was held that the rule of equity, which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts and insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking" and is not such a claim as the *Registry Act* declares shall not be allowed to prevail against the provisions thereof.

Foundation
of the rule.

Consolidation is founded on the equitable maxim that "he who seeks equity must do equity."

"The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the court of equity to put its own price upon its own interference as a matter of equitable consideration in favcur of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the courts of equity and asks to redeem upon what are called equitable considerations, and then the court of equity says:—'This is the price upon which we give you the relief you seek, namely, on your paying all that is due'" (e).

The right to consolidate does not exist unless the mortgaged properties belong to the same mortgagor or those claiming under him (f).

The right to consolidate applies to both legal and equitable mortgages (g). The right where it exists belongs to the mortgagee only. The mortgagor cannot compel the mortgagee to consolidate (h).

It was formerly contended that the right to consolidate could be asserted only in a suit for redemption, and not in

(d) (1876) 23 Gr. 631.

(e) *Cummins v. Fletcher* (1880) 14 Ch. D. 699, at p. 708, *per James, L.J.*

(f) *Higgins v. Frankis* (1846) 15 L.J. Ch. 329.

(g) *Tweedale v. Tweedale* (1857) 23 Beav. 341; *Neve v. Pennell* (1863) 2 H. & M. 170.

(h) *Pelly v. Wathen* (1849) 7 Ha. 351; affirmed 1 DeG. M. & G. 16.

Mortgagee
may claim
consolida-
tion whether
action be for
foreclosure
or for
redemption.

a suit for foreclosure; but it has been held that the right may be insisted upon in either (*i*).

The principle is thus explained in *Cummins v. Fletcher* (*ii*) :—

"A bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this: 'You have a right to redeem and you may exercise that right at any time within twenty years, according to the usual practice of the court, but I do not want to be kept in a state of uncertainty as to whether I am or am not to be redeemed, and therefore if you want to redeem me, redeem me now,' and the mortgagee has a right to say: 'Redeem me upon those terms upon which you would be entitled to redeem if you filed your redemption suit.' That is all. If you do not redeem your equity of redemption is gone; the only result, therefore, of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time."

Where one of the mortgages sought to be consolidated is not in default the rule cannot be enforced as to it; for the mortgagor still has the legal right to redeem the mortgage not in default according to its terms and need not come into a court of equity before he is entitled to redeem (*j*). Nor can the right be insisted on as a condition of granting the mortgagor relief in respect of a legal claim, for example, a claim to insurance moneys payable in respect of one of the mortgaged properties (*k*).

The rule applies not only where the mortgages in respect of which consolidation is sought were originally made to one mortgagee, but also where they were originally made to several mortgagees and have afterwards come to the same hand by transfer (*l*); and it may be enforced not only as against the mortgagor but also, subject to the limitations to be noticed presently, against all persons claim-

All mortgages sought to be consolidated must be in default.

Several mortgages to different persons afterwards united.

(*i*) *Cummins v. Fletcher* (1880) 14 Ch. D. 699; *Watts v. Symes* (1851) 1 DeG. M. & G. 240; *Johnston v. Reid* (1881) 29 Gr. 293.

(*ii*) (1880) 14 Ch. D. 699, at p. 708.

(*j*) *Cummins v. Fletcher* (1880) 14 Ch. D. 699.

(*k*) *Re Union Assurance Co.* (1893) 23 Ont. 627.

(*l*) *Pledge v. Carr* [1895] 1 Ch. 51; S.C. *sab nom.*, *Pledge v. White* [1896] A.C. 187; *Silverthorn v. Glazebrook* (1899) 30 Ont. 408.

ing title under the mortgagor to all of the mortgaged properties, or to any one of them, or to a part of one or more of them (*m*).

**Surplus
after sale.**

**Where
equity of
redemption
in one
property is
assigned
before the
making of
mortgage
on the other
property.**

So, where a mortgagee, under a power of sale, sells the lands comprised in one of his mortgages, and a surplus remains after satisfying that mortgage, he may hold the surplus and consolidate it with other mortgages which he holds against other properties of the mortgagor (*n*).

There is no right to consolidate where the equity of redemption in one of the properties is assigned, either absolutely or by way of mortgage, before the making of the mortgage on the other property (*o*) ; even if the assignee is only a volunteer (*p*).

In *Mills v. Jennings* (*q*) Cotton, L.J. in delivering the judgment of the Court of Appeal said :—

"As a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect inequity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate as soon as the second mortgage is created a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid. The principle which allows as against a subsequent purchaser or mortgagee the right of consolidation is that the mortgagor cannot by any dealing with the equity of

(*m*) *Vint v. Padget* (1858) 2 DeG. & J. 611; *Selby v. Pomfret* (1861) 1 J. & H. 336; 3 DeG. F. & J. 595; *Hyman v. Roots* (1863) 10 Gr. 340.

(*n*) *Selby v. Pomfret* (1861) 3 DeG. F. & J. 595.

(*o*) *Baker v. Gray* (1875) 1 Ch. D. 491; *Jennings v. Jordan* (1881) 6 App. Cas. 698.

(*p*) *In re Walhampton Estate* (1884) 26 Ch. D. 391.

(*q*) (1880) 13 Ch. D. 639, at p. 646; affirmed on appeal *sub nom. Jennings v. Jordan* (1881) 6 App. Cas. 698.

redemption prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate."

In *Re Walhampton Estate* (r) the owner of estate A. Volunteer executed a voluntary settlement of the estate, and then mortgaged it. Afterwards he mortgaged estate B., and both mortgages came into the hands of the same person who claimed to consolidate them as against the persons claiming under the settlement. Kay, J. in delivering judgment said:—

"I consider the claim for consolidation on the part of the mortgagees to be utterly unfounded. It is true that the voluntary settlement is void as against the subsequent mortgagee to the extent of the mortgage. But because that mortgagee afterwards obtains from the mortgagor another security is he to be allowed to consolidate his two securities, so as to throw on the estate, subject to the settlement, any part of the sum which may be owing to him beyond that originally charged thereon? In my opinion he clearly cannot do so. The Statute of Elizabeth gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein. No authority has been cited which bears out the contention of the mortgagees in this case, and I therefore hold that the settled estate is liable only to the extent of the sums charged thereon by the mortgages expressly affecting it."

If the owner of two properties mortgages both to A., and subsequently mortgages one of them to B. and

(r) (1884) 26 Ch. D. 391, at p. 393.

gives a second mortgage on the other to A., the latter cannot consolidate so as to obtain priority for both his mortgages over B.'s mortgage (s).

Two or more mortgages to different persons united after severance of equity.

Where two or more mortgages originally held by different persons do not become united in title in one person until after the equity of redemption in one of them has been assigned, the person holding the mortgages is not entitled to consolidate as against the assignee of the equity of redemption (t).

Fry, J. (afterwards L.J.) in the course of his judgment in *Harter v. Colman* (u) said :—

"Taking the case of an assignment of an equity of redemption, must the assignee of the equity of redemption do all such equities as his assignor would have been liable to at the time when the redemption action was brought, or must he perform, and hold subject to, those equities only to which his assignor was liable at the date of the assignment? If it be the former, the assignee of the equity of redemption of one of the estates would be in no better position than the assignor, if he had remained the owner of both of the equities of redemption. If, on the other hand, the assignee takes subject to those equities only which were subsisting against his assignor at the time of the assignment of the equity of redemption, he will be in a better position than the assignor, because the union of the two mortgages in the case supposed takes place subsequently to the assignment, and the equity which arises from the union, therefore, originates subsequently to the assignment. . . . I may refer by way of analogy to the case which I mentioned in the course of the discussion, *Watson v. Mid-Wales Railway Company* (v), as illustrating what I understand to be the rule applicable to the assignment of *chooses in action*, viz., that the assign of a *choose in action* takes it subject to all equities subsisting at the time of the assignment, and not to equities which arise subsequently, and which did not exist at that time."

Where the equities of redemption in all of the mortgaged properties have been assigned to one person, and afterwards the mortgages originally held by different persons become

(s) *Ford v. Tynte* (1872) 41 L.J. Ch. 758; *Mutual Life Assurance Society v. Langley* (1886) 32 Ch. D. 460; *Flint v. Howard* [1893] 2 Ch. 54; *Buckler v. Bowman* (1866) 12 Gr. 457.

(t) *Harter v. Colman* (1882) 19 Ch. D. 630; overruling *Beevor v. Luck* (1867) L.R. 4 Eq. 537; *White v. Hillacre* (1839) 3 Y. & C. Ex. 597; *Fraser v. Nagle* (1888) 16 Ont. 241.

(u) (1882) 19 Ch. D. 630, at p. 633.

(v) (1867) L.R. 2 C.P. 593.

united in one assignee, the latter will have the right to consolidate (*w*).

The right to consolidate is lost if the several mortgages originally held by one person are assigned to different persons, or if one of the mortgages has ceased to exist (*x*).

Mortgages assigned to different persons.

In England it has been held that where the right to consolidate existed and the equities of redemption have afterwards been assigned to different persons, the mortgagee may enforce the right against the assignees, although they had no notice of the existence of the right (*y*).

Where equities of redemption afterwards severed.

As to mortgages made on or after the 1st day of January, 1882, it is provided in England by the *Conveyancing and Law of Property Act, 1881* (*z*), that there shall be no right of consolidation in the absence of a contrary intention expressed in the mortgages or one of them (*a*). In Ontario the *Registry Act* (*b*) does not deal in express terms with the right to consolidate. But the statute affects the doctrine indirectly; for a mortgagee may not consolidate as against subsequent mortgagees or purchasers of one of the mortgaged properties, unless they took with notice of the right to consolidate (*c*).

And so where a purchaser of the mortgaged lands enquires of the mortgagee before purchasing the amount due on the mortgage and acquaints him of his intending purchase, the mortgagee will have no right as against such purchaser to consolidate his mortgage with another

(*w*) *Vint v. Padgett* (1858) 2 DeG. & J. 611; approved in *Pledge v. White* [1896] A.C. 187.

(*x*) *Re Raggett, ex parte Williams* (1880) 16 Ch. D. 117.

(*y*) *Jones v. Smith* (1794) 2 Ves. 372; *Jennings v. Jordan* (1881) 6 App. Cas. 698.

(*z*) 44 & 45 Vict. Imp. c. 41, s. 17.

(*a*) *Bird v. Wenn* (1886) 33 Ch. D. 215.

(*b*) R.S.O. (1897) c. 136.

(*c*) *Brower v. Canada Permanent Building Association* (1877) 24 Gr. 509; *Johnston v. Reid* (1881) 29 Gr. 293; *Miller v. Brown* (1882) 3 Ont. 210; *Smith v. Smith* (1889) 18 Ont. 205.

Right to consolidate is merely equitable.

Registry Act

security on other lands, if he neglects to notify the purchaser of his right. The registration of the mortgage on the other lands is not notice (*d*).

The right of consolidation is an equitable right and is liable to be defeated unless the person against whom it is sought to be enforced had actual notice of it at the time of his acquiring an interest in the lands.

Section 92 of the *Registry Act* provides that registration shall constitute notice of the instrument to all persons claiming any interest in the lands. Section 97 provides that "priority of registration shall prevail unless before the prior registration there has been actual notice or the prior instrument by the party claiming under the prior registration." Section 98 provides that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this Province, as against a registered instrument executed by the same party, his heirs or assigns."

In *Johnston v. Reid* (*e*), Spragge, C., in delivering judgment, said:—

"The policy of our legislature has been to allow no effect to occult equities, and in the case of transfers of real estate, whether absolutely or by way of mortgage; that men dealing in real estate should be able to find the state of the title by search in the registry offices, and in one or two other public offices."

A subsequent mortgagee who is entitled to consolidate may insist on his right when proving his claim in the Master's office. He may prove his claim on both mortgages and insist on being redeemed as to both (*f*).

The law relating to the right of consolidation may be summarized in the following propositions:—

Where the mortgagee holds all the mortgages sought to be consolidated either as original mortgagee or as transferee,

Summary of law of consolidation

(*d*) *Dominion Savings and Investment Society of London v. Kittridge* (1876) 23 Gr. 631.

(*e*) (1881) 29 Gr. 293.

(*f*) *Ross v. Stevenson* (1877) 7 P.R. 126; *Merritt v. Stephenson* (1858) 7 Gr. 22.

and the equities of redemption remain in the mortgagor or are all assigned to one person, either before or after the mortgages become united in title, the holder of the mortgages may consolidate as against—

(a) The holder of the equities of redemption and his representatives;

(b) Subsequent purchasers and mortgagees of the equities of redemption, or any of them, or any part of one or more of them, with notice of the right.

2. Where the mortgages sought to be consolidated do not become united in title until after the severance of the equities of redemption, the holder of the mortgages may not consolidate as against subsequent purchasers or mortgagees of the equities of redemption.

The principle of this rule is that no right to consolidate exists at the time when the interests are acquired, and the mortgagee cannot acquire the right as against subsequent purchasers or mortgagees after they have advanced their money.

3. Where the mortgages sought to be consolidated are made by the same mortgagor, and some of them are made before, while others are made after, the severance of the equities of redemption, the mortgagee has no right to consolidate as against subsequent purchasers or mortgagees of the equities of redemption.

The reason of this rule is that a mortgagor who has assigned the equity of redemption cannot by any subsequent act prejudice the right of his assignee.

CHAPTER XXII.

MERGER.

When it arises.

Merger depends on intention.

Merger arises when two or more estates in the same property become vested in the same person. Thus where a mortgage in fee simple and the estate subject thereto become vested in the person who is tenant in fee or in tail of the estate, it is presumed that the mortgage is merged in the inheritance of the estate and extinguished; but no such presumption arises in the case of an owner who is tenant for life. The presumption in either case is rebuttable by evidence of contrary intention (a).

Equity has not been guided as to merger by the rules of law. The question whether a charge is extinguished or preserved depends upon the intention of the party in whom the charge and the estate subject to the charge are united (b).

Prior to the *Ontario Judicature Act, 1881*, it frequently occurred that there was a merger at law which was not recognized as such in equity. But by that enactment (c) it is provided as follows:—

58. (3) There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to the *Ontario Judicature Act, 1881*, have been deemed merged or extinguished in equity (d).

There is no merger at law of a lower in a higher security if the remedy given by the latter is not co-extensive

(a) *Hood v. Phillips* (1841) 3 Beav. 513; *Burrell v. Earl of Egremont* (1843) 7 Beav. 205; *Thorne v. Cann* [1895] A.C. 11; *Tyrwhitt v. Tyrwhitt* (1863) 32 Beav. 244.

(b) *Donisthorpe v. Porter* (1762) 2 Eden 162; *Forbes v. Moffatt* (1811) 18 Ves. 384; *Astley v. Milles* (1827) 1 Sim. 298, 341.

(c) See now R.S.O. (1897) c. 51, s. 58, sub-s. 3.

(d) In Nova Scotia there is a similar provision in R.S.N.S. (1884) c. 104, s. 13, sub-s. 3. In the North-West Territories see *Judicature Ordinance Act, 1898*, s. 10, sub-s. 3.

with that given by the former (e). The general rule is General rule. that where the owner of the equity of redemption, not being personally liable on the mortgage, pays it off, or where the mortgagee acquires the equity of redemption, then, in the absence of evidence of a contrary intention, the charge becomes merged in the estate and is extinguished. It thus becomes a question of intention whether the charge will be kept alive and merger prevented. Very slight expressions of intention will suffice (f).

Question of intention.

Romilly, M. R. in *Tyrwhitt v. Tyrwhitt* (g) said :—

"The rule is this: *prima facie* the charge merges in the inheritance, but the presumption may be rebutted if it be shown that the intention of the owner of the charge was that it should not merge. Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time when he became entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, when the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance."

And so in *North of Scotland Mortgage Co. v. Udell* (h) Hagarty, C. J. said :—

"From all the authorities I gather that in the simple case of the mortgagee taking a conveyance of the equity of redemption, the ordinary presumption is, that the charge, as against the mortgagor, is merged or incapable of being enforced, at least so as to call for evidence to show a contrary intent or result (i)."

The intention to keep alive or to extinguish a charge may be gathered from the language of the deed and from the circumstances attending the transaction (j).

Intention may be gathered from express words or surrounding circumstances.

(e) *Bell v. Banks* (1841) 3 M. & G. 258; *Chetwynd v. Allen* [1899] 1 Ch. 353.

(f) *Phillips v. Gutteridge* (1859) 4 DeG. & J. 531; *Hart v. McQuesten* (1875) 22 Gr. 133; *Weaver v. Vandusen* (1880) 27 Gr. 477; *Macdonald v. Bullivant* (1884) 10 Ont. App. 582; *In re Cork Harbor Docks Co.* (1885) 17 L.R. Ir. 515; *Thorne v. Cann* [1895] A.C. 11.

(g) (1863) 32 Beav. 244, at p. 249.

(h) (1882) 46 U.C.R. 511.

(i) See also *North of Scotland Mortgage Co. v. German* (1880) 31 U.C.C.P. 349.

(j) *Adams v. Angell* (1877) 5 Ch. D. 634; *Thorne v. Cann* [1895] A.C. 11.

Express words outweigh circumstances.

Benefit of person paying off charge.

Assignment of charge to third person.

Charge and estate must unite in same person during his life.

No merger if it would give priority to intervening incommunicant.

In certain cases the language of the deed purporting to extinguish a charge has been held to outweigh all indications of a contrary intention to be gathered from surrounding circumstances, or to be presumed from the interest which the person paying the charge had in keeping it alive (k).

The intention to keep a charge alive will be presumed when it is for the benefit of the person paying it off or otherwise acquiring it that it should be kept alive, and this presumption may countervail language in the deed pointing to an extinction of the charge (l).

The fact that a person paying off a charge upon an estate in which he has only a partial interest has neglected to take an assignment to a trustee for himself, is not of itself sufficient to rebut the presumption that the charge was intended to be kept alive (m).

The presumption in favour of merger does not arise unless the absolute interest in the charge and in the estate subject to the charge unite in the same person during his life. Thus, no presumption arises where the estate in fee of the person entitled to the charge is subject to limitations which only become capable of taking effect by his death, or where the owner of the estate charged has during his life merely a reversionary interest in the charge (n).

Where a mortgagee purchases the equity of redemption there will be no presumption in favor of merger where the effect of a merger would be against the interest of the

(k) *Parry v. Wright* (1823) 1 Si. & St. 369; 5 Russ. (1828) 142; *Brown v. Stead* (1832) 5 Sim. 535; *Smith v. Phillips* (1837) 1 Kee. 694; *Medley v. Horton* (1844) 14 Sim. 222, 226.

(l) *Irby v. Irby* (No. 3) (1858) 25 Beav. 632; *Adams v. Angell* (1877) 5 Ch. D. 634; *Thorne v. Cann* [1895] A.C. 11; *Liquidation Estates Purchase Co. v. Willoughby* [1896] 1 Ch. 726.

(m) *Redington v. Redington* (1809) 1 B. & B. 131, 140; *Morley v. Morley* (1855) 5 DeG. M. & G. 610, 619.

(n) *Wyndham v. Lord Egremont* (1775) Ambl. 753; *Wilkes v. Collin* (1869) L.R. 8 Eq. 338.

mortgagee, as, for example, where an intervening incumbrance would thereby obtain priority (o).

The *Act respecting Mortgages of Real Estate* (q) provides as follows:—

8. Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property.

Merger of
mortgage
debt in
equity of
redemption.

9. In case such prior mortgagee or his assignee acquires the equity of redemption of the mortgagor in the manner aforesaid no subsequent mortgagee or his assignees shall be entitled to foreclosure or sell such property without redeeming or selling subject to the rights of such prior mortgagee or his assignee, in the same manner as if such prior mortgagee or his assignee had not acquired such equity of redemption.

10. The preceding two sections shall not affect any priority or claim which any mortgagee may have under the registry laws.

Where a mortgagee purchases the equity of redemption at a sheriff's sale this will have the effect of merger as to the mortgagor although not as to a mesne incumbrancer (r).

In British Columbia it has been held that a conveyance of the equity of redemption by a mortgagor to a mortgagee of lands does not constitute a discharge of the mortgage by merger, unless it is made to appear that such a result was intended by the parties; and when a mortgagee applies to register a conveyance of the equity of redemption the registrar should not mark the mortgage merged unless at the request of the mortgagee (s).

But where the assignee of a term subject to a mortgage purchases the fee, the two estates are merged and the mortgage becomes a charge on the fee. The purchaser in that case is not entitled to a lien for his purchase money as against the mortgagee (t).

Merger of a
term in the
fee.

(o) *Forbes v. Moffatt* (1811) 18 Ves. 384; *Davis v. Barrett* (1851) 14 Beav. 542; *Elliott v. Jayne* (1865) 11 Gr. 412; *MacLennan v. Gray* (1888) 16 Ont. 321.

(q) R.S.O. (1897) c. 121.

(r) R.S.O. (1897) c. 77, s. 32; *Woodruff v. Mills* (1860) 20 U.C.R. 51.

(s) *In re Major* (1897) 5 B.C.R. 244.

(t) *Building and Loan Association v. McKenzie* (1897) 24 Ont. App. 599; 28 S.C.R. 407.

And where the mortgagor or other person personally liable to pay the mortgage debt pays off the mortgage, or purchases the mortgaged property on a sale by the mortgagee under his power, the mortgage is necessarily extinguished, and the mortgagor cannot set it up against a subsequent incumbrance created by him (*u*).

Where a mortgagee of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to the bargain between the parties at the time of his obtaining the transfer (*v*).

(*u*) *Otter v. Lord Faux* (1856) 2 K. & J. 650; 6 DeG. M. & G. 638; *Platt v. Mendel* (1884) 27 Ch. D. 246.

(*v*) *Finlayson v. Mills* (1865) 11 Gr. 218; see *Barker v. Eccles* (1871) 18 Gr. 440.

PART III.

RIGHTS AND LIABILITIES OF THOSE CLAIMING UNDER THE MORTGAGEE.

CHAPTER XXIII.

RIGHTS OF ASSIGNEE OF MORTGAGE.

A mortgage may be assigned and the land conveyed Mortgage
to a third person, together with the mortgage debt and may be
the benefit of the powers and covenants contained assigned.
in the mortgage.

The rights, powers, remedies and liabilities of an Generally.
assignee of a mortgage under a valid assignment are, in
general, the same as those of the mortgagee himself. Thus,
he may distrain, or maintain an action on the covenant for
payment or for foreclosure or sale, or he may take
possession of the mortgaged premises, or he may sell
under the power of sale contained in the mortgage, or he
may discharge, assign or reconvey as fully as the mort-
gagee himself might have done.

He will not, however, have the benefit of the powers Must be
and covenants contained in the mortgage, unless they are validly
validly assigned to him. And the covenants, in order
that they may be assigned, must be made expressly with the
mortgagee and his assigns; or if the assigns are not
expressly named the covenants must be such that they
may be validly assigned, although the assigns are not
expressly mentioned.

Power of
sale.

A power of sale is a personal power and cannot be exercised by the assignee unless expressly reserved to him in the mortgage deed (*a*).

License to
distain.

It is probable that a license to distrain cannot be exercised by the assignee unless he is expressly named. The assignee of a mortgage, moreover, cannot distrain for arrears of rent which have accrued before the assignment (*b*).

Assignment
of
mortgage.

An assignment of mortgage is in practice effected by an absolute assignment of the mortgage and the moneys secured thereby, and the benefit of all powers, covenants and provisoies contained therein, and also the power and authority to use the name of the mortgagee, his heirs, executors, administrators or assigns, for enforcing the performance of the covenants and provisoies in the mortgage; and also by the conveyance of the mortgaged lands.

Mortgage
debt.

At law the mortgage debt being a chose in action was not, in general, assignable so that the assignee could sue for it in his own name. Assignments of choses in action are now governed by sub-section 5 of section 58 of the Ontario *Judicature Act* (*c*) which is as follows:—

Assignment
after 31st
December,
1897.

58. (5) An absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted) to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor (*d*).

This provision is not retrospective, wherein it differs from the corresponding section in force in England.

(*a*) *Re Gilchrist and Island* (1886) 11 Ont. 537. But see R.S.O. (1897) c. 121, s. 29 (1), *supra* p. 168.

(*b*) *Brown v. The Metropolitan Counties etc. Society* (1859) 1 E. & E. 832.

(*c*) R.S.O. (1897) c. 51.

(*d*) In Nova Scotia the corresponding section is R.S.N.S. (1884) c. 104, order LXI; in the North-West Territories a similar section is to be found in c. 41 of the Consolidated Ordinances of 1898.

Formerly assignments of choses in action were governed by sections 6 and 7 of the *Mercantile Amendment Act* (e) which were as follows:—

Assignment made before 31st December, 1897.

6. In the next succeeding six sections of this Act, "Assignee" shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance, or other obligation thereby secured.

7. Every debt and chose in action arising out of contract shall be assignable by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof, shall sue thereon in his own name in the action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province.

These sections were repealed by 60 Vict. (Ont.) chapter 15, section 5, and are not included in the Revised Statutes of Ontario, 1897. But assignments made before the 31st day of December, 1897, are still governed by these sections.

The assignee may sue in his own name, and it is not necessary that power should be given him to proceed in the name of the mortgagee although it is usually given.

Assignee may sue in his own name.

It often happens that an assignment, although in writing, is insufficient to transfer the lands or any interest of the mortgagee in the mortgage.

Informal assignment.

Thus where the holder of a mortgage security, while laboring under an attack of sickness of which he subsequently died, indorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed but did not seal, although the memorandum expressed it to be under seal; it was held that the wife took no interest under such assignment, either as a gift *inter vivos* or as a *donatio mortis causa*; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs (f).

(e) R.S.O. (1887) c. 122.

(f) *Tiffany v. Clarke* (1858) 6 Gr. 474.

Where a mortgagee by indorsement on the mortgage deed assigned to M. "his executors, administrators and assigns, all his right, title and interest in and to the within mortgage," this was held insufficient to pass the land mortgaged (g).

And where an assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title and interest therein" of the assignor, "to have and to hold the same unto the said &c., his heirs and assigns, to his and their sole use forever," it was held that the land mortgaged did not pass by these words (h).

An assignment by an administratrix of a mortgage, being part of the assets of the intestate, was held valid, though not therein stated to be executed by her as administratix (i).

Where the granting part of a deed of assignment of mortgage transfers the indenture simply, and the *habendum* transfers the interest in the land described in the indenture, the estate passes (j).

Proper words

It has been held that the words "assign, transfer and set over" in an assignment of a mortgage are the proper technical words to pass an estate in lands and tenements (k).

"Convey-
ance."

It is provided, however, by the *Act respecting the Law and Transfer of Property* (l) as follows:—

1. (6) "Conveyance" shall include feoffment, grant, assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property; and "convey" shall have a meaning corresponding with that of conveyance.

(g) *Moran v. Currie* (1857) 8 U.C.C.P. 60.

(h) *Auston v. Boulton* (1866) 16 U.C.C.P. 318.

(i) *Yarrington v. Lyon* (1866) 12 Gr. 308.

(j) *Doe d. Wood v. Fox* (1846) 3 U.C.R. 134.

(k) *Watt v. Feader* (1862) 12 U.C.C.P. 254.

(l) R.S.O. (1897) c. 119, s. 1, sub-s. 6.

And it is apprehended that the word "convey" in an assignment of mortgage would now be sufficient to pass the lands.

In New Brunswick it was held that a grant of "all lands situate in the Province of New Brunswick of which the grantor was seized in fee" was insufficient to pass lands to which the grantor was entitled as mortgagee (*m*). General grant of lands does not pass mortgagee's title.

Where by the assignment the lands only are conveyed, the mortgage debt passes with the estate although not expressly assigned. In such a case the assignee could not sue on the covenant for payment, but the mortgagor could not redeem without payment of the amount due (*o*). Assignment of lands passes the mortgage debt.

An assignment of mortgage will not pass arrears of rent which accrued prior to the assignment, unless expressly mentioned (*p*). But not arrears of rent.

It is not necessary to a valid assignment that the mortgagor should concur therein or that notice thereof should be given to him (*q*). Mortgagor need not concur.

But it is advisable either that the mortgagor should be a party to the assignment, or that proof of the state of the account should be given, and that notice of the assignment should be given at once to the mortgagor and an admission obtained from him of the amount due and owing on the mortgage. For if no notice of the assignment is given to the mortgagor he may pay the mortgage moneys, or part of them, to the mortgagee, and the assignee will be bound by such payment. Notice to mortgagor.

Apart from statutory enactment, an assignee under an assignment of a mortgage without the mortgagor's concurrence can only claim what is owing on the security on the Assignee takes subject to actual state of accounts and to equities.

(*m*) *Doe d. Holderness v. Donelly* (1846) 3 Kerr. (New Bruns.) 238.

(*o*) *Jones v. Gibbons* (1804) 9 Ves. 407.

(*p*) *Salmon v. Dean* (1851) 3 Mac. & G. 344.

(*q*) *Jones v. Gibbons* (1804) 9 Ves. 407.

Defence of purchase of mortgage for value without notice.

footing of such accounts and equities as would bind the original mortgagee (*r*).

Under section 33 of the *Act respecting Mortgages of Real Estate* (*s*) the purchaser in good faith of a mortgage may set up the defence of purchase for value without notice, except as against the mortgagor, his heirs, executors, administrators and assigns. The section is as follows:—

33. The purchaser in good faith of a mortgage may to the extent of the mortgage (and except as against the mortgagor, his heirs, executors, or administrators) set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do (*t*).

This section was first enacted in 1876 by 39 Vict. chapter 7 (Ont.).

Formerly defence of purchase for value not allowed.

Proof of payment.

Prior to that enactment it was held that an assignee of a mortgage could not set up the defence of purchase for value without notice (*u*).

Section 36 of the *Act respecting the Law and Transfer of Property* (*uu*) is as follows:—

36. It shall in no case be necessary, in order to maintain the defence of a purchase for value without notice, to prove payment of the mortgage money or purchase money, or any part thereof.

In *Smart v. McEwan* (*v*) the registered owner of land mortgaged the same, and afterwards conveyed absolutely to a purchaser, who registered his deed before the mortgage was registered and gave a second mortgage to his vendor to secure purchase money. Subsequently the vendor assigned his mortgage to a purchaser who had no

(*r*) *Matthews v. Wallwyn* (1798) 4 Ves. 118; 18 R.C. 243; *McPherson v. Dougan* (1862) 9 Gr. 258; *Wilson v. Kyle* (1880) 28 Gr. 104.

(*s*) R.S.O. (1897) c. 121.

(*t*) In Manitoba the corresponding sections are to be found in R.S. Man. (1891) c. 99, ss. 1, 2.

(*u*) *Ryckman v. The Canada Life Assurance Co.* (1870) 17 Gr. 550; *Smart v. McEwan* (1871) 18 Gr. 623; but such a defence was held to be good in *Muir v. Dunnett* (1864) 11 Gr. 85; *Totten v. Douglas* (1868) 15 Gr. 126.

(*uu*) R.S.O. (1897) c. 119.

(*v*) (1871) 18 Gr. 623.

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notice of the prior mortgage. It was held that the purchaser's mortgage in the hands of the assignee was subject to the lien or charge of the vendor's mortgagee.

It will be observed that the purchaser may, under section 33 of the *Act respecting Mortgages of Real Estate*, set up this defence except as against the mortgagor, his heirs, executors, administrators and assigns.

There is however a distinction between equities growing out of the personal relations of the mortgagor and the mortgagee, and those which affect the state of the mortgage account (*w*).

Distinction
between
personal
equities and
state of
account.

In *Wright v. Leys* (*x*) the plaintiff was the mortgagor and the defendant Leys was the holder of the mortgage. The plaintiff alleged that pursuant to agreement a prior holder of the mortgage had purchased it as trustee for the plaintiff, and that the defendant Leys had purchased the mortgage from the prior holder subject to that equity. It was held that the agreement fell within the *Statute of Frauds* and should have been in writing, and that even if writing was not required the defendant Leys, who purchased in good faith for value and without notice of the agreement, could not be affected by it.

Boyd, C. in delivering the judgment of the court said:—

"As against Leys, who bought without notice of this arrangement, the pretensions of the plaintiff cannot be effectively asserted, first, because the agreement should have been but was not in writing, and secondly, because this is not one of the equities which attach upon the assignment of a mortgage. The distinction between equities like this growing out of the personal relations of the mortgagor and the purchaser of the mortgage, and those which affect the state of the mortgage account, are recognized in the cases referred to during the argument of *Nant-y-Glo &c. Ironworks Co. v. Tamplin* (1876) 35 L.T. 125; *Judd v. Green* (1875) 33 L.T. 597; and *Davis v. Hawke* (1854) 4 Gr. 394."

In *Bridges v. The Real Estate Loan and Debenture Co.* (*y*) a similar conclusion was arrived at. In that case

(*w*) *Wright v. Leys* (1884) 8 Ont. 88.

(*x*) (1884) 8 Ont. 88.

(*y*) (1885) 8 Ont. 493.

an agreement had been made to mortgage certain lands, but other lands had been included in the mortgage by mistake. The plaintiff, as purchaser from the mortgagor, claimed that the defendants, who were assignees of the mortgage for value without notice, took subject to his equity to have a reconveyance of the lands which had been included by mistake. It was held that under the statutory provisions then in force corresponding to section 33 of the *Act respecting Mortgages of Real Estate* above quoted and to section 98 of the *Registry Act* the plaintiff could not recover.

Section 98 of the *Registry Act* (z) is as follows:—

98. No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act.

Forged
assignment

But where as between a mortgagee and his assignee the signature of the mortgagee to the assignment has been forged, or has been procured by the fraud and misrepresentation of a third party, the assignment is void even in the hands of an innocent holder, and the defence of purchase for value without notice is unavailing (*a*).

**Covenant by
trustee.**

Where a person holding lands as trustee executed a mortgage at the request of the beneficial owners, but without any consideration, and the mortgage contained a covenant for payment of the mortgage debt without the knowledge of the trustee or any intention on his part to become personally liable, it was held that an assignee of the mortgage for value without notice could not enforce payment against him (*b*).

Assignee
takes subject
to the state
of account
between
mortgagor
and mort-
gagee.

The section in question does not affect the rule that an assignee of a mortgage takes subject to the state of the account between the mortgagor and mortgagee.

(z) R.S.O. (1897) c. 136

(a) *Herchmer v. Elliott* (1887) 14 Ont. 714; *Ex parte Swinbanks* (1879) 11 Ch. D. 525.

(b) *Patterson v. McLean* (1891) 21 Ont. 221

The rule that an assignee of a mortgage takes subject to the state of account between the mortgagor and mortgagee was acted upon and applied in a case where, in 1875, a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband should be applied as soon as ascertained on the mortgage, and that any future accounts that might become due to the husband for lumber supplied to the mortgagee and work done for him should also be so applied. The mortgage about fifteen months afterwards was sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, but it was held that the purchaser, having taken the assignment without inquiring as to the state of account, was bound thereby (c). Right of set-off.

A mortgagor and mortgagee dealt together some years without any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off in favour of the mortgagor for the balance due him on their general dealings. It was held that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity (d).

Where two persons were mortgagees, and one assigned his interest to the other, the mortgagor was allowed credit, as against the assignee, for goods delivered to the assignor, until he received notice of the assignment (e).

Where a mortgagor, in a suit to foreclose, set up that before notice of assignment of the mortgage he had, at the instance of the mortgagee, incurred liabilities for, and paid off debts of the mortgagee, equal to the amount due on the mortgage, a reference was directed to the Master to inquire Payment by mortgagor before notice of assignment of mortgage.

(c) *Pressey v. Trotter* (1878) 26 Gr. 154.

(d) *Court v. Holland* (1881) 29 Gr. 10.

(e) *Galbraith v. Morrison* (1860) 8 Gr. 280.

as to this; and it was directed that if this should be found to be so, the bill should be dismissed with costs (*f*).

Mortgage for
larger sum
than sum
actually
advanced.

Notice.

Payment to
mortgagee
without
notice of
assignment.

Exchange of
lands subject
to mortgages

But where a mortgagor acknowledged in the mortgage deed to have received £250 although in fact he only received £91, it was held that as against an assignee of the mortgage, who purchased in good faith for value without notice and before maturity of the mortgage, he could not redeem except on payment of the full amount (*ff*).

Where, however, the assignee has notice that the full amount was not advanced, although there is a receipt indorsed, he is bound by the actual state of the accounts (*g*).

A mortgage was held by an assignee for the benefit of the mortgagee who assigned it, and the mortgagor, without notice of such assignment, paid the mortgagee and obtained from him a discharge under the statute. The court held the payment good, and ordered the assignee to execute a release, it being doubtful whether under the circumstances the discharge from the mortgagee would revest the property in the mortgagor (*h*).

A., the owner of lot 1, mortgaged it to his solicitor who assigned the mortgage to a third party. A. then agreed with B., the owner of lot 2, to exchange lots and to have the mortgage transferred to lot 2. A's solicitor who acted for both parties prepared a new mortgage on lot 2 to himself and did not inform A. or B. that the former mortgage on lot 1 had been assigned. Afterwards A. paid off the mortgage on lot 2 to the solicitor and obtained a discharge. The solicitor after paying the interest on the mortgage on lot 1 to the assignee for several years made default, and

(*f*) *Baskerville v. Otterson* (1873) 20 Gr. 379; *Henderson v. Brown* (1871) 18 Gr. 79.

(*ff*) *Bickerton v. Walker* (1885) 31 Ch. D. 151, but see *Pressey v. Trotter* (1878) 26 Gr. 154; *Eagleson v. Howe* (1879) 3 Ont. App. 566; *Manley v. London Loan Co.* (1896) 23 Ont. App. 139; 26 S.C.R. 443.

(*g*) *Manley v. London Loan Co.* (1896) 23 Ont. App. 139; 26 S.C.R. 443.

(*h*) *McDonough v. Dougherty* (1862) 10 Gr. 42. See also *Engerson v. Smith* (1862) 9 Gr. 16.

the assignee applied for payment to A. who was then first made aware of the assignment. Under these circumstances it was held that the payments made by A. to the solicitor on the mortgage on lot 2 did not discharge the mortgage on lot 1, and that B. the purchaser of lot 1 was affected with notice of the assignment of the mortgage on lot 1, as it was registered before he purchased, and was also affected with constructive notice by reason of his omission to make enquiries when he purchased; and the assignee, therefore, was held to be entitled to foreclosure (j).

The assignee of a mortgage, after maturity, takes the mortgage subject to all equities, as well those of third parties, as those of the parties to the instrument (k).

The assignee is entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the mortgagees, a loan company, could not legally have reserved such a rate of interest (l).

The purchaser of an equity of redemption took an assignment of a charge upon the property and paid off the incumbrancer. It was held that the charge was not extinguished, for there was no evidence in the deed or the circumstances of any intention to extinguish the charge, and it was for the purchaser's benefit to keep it alive (n).

In New Brunswick it has been held that an assignee of a mortgagee in possession may set up the mortgage as a defence to an action of ejectment by the owner of the equity of redemption, though the mortgage is more than twenty years old, and the right to recover thereon is barred by the *Statute of Limitations* (o).

An assignment of a mortgage by way of mortgage, called a sub-mortgage, may be made either by a formal

Assignment
after
maturity.

Assignment
of mortgage
to purchaser
of equity of
redemption.

(j) *Gilleland v. Wadsworth* (1877) 1 Ont. App. 82.

(k) *Elliott v. McConnell* (1874) 21 Gr. 276.

(l) *Reid v. Whitebread* (1864) 10 Gr. 446; 2 E. & A. 580.

(n) *The Liquidation Estates Purchase Co. Ltd. v. Willoughby* [1898] A.C. 321.

(o) *Doe d. Slason v. Hanson* (1857) 3 All. (New Bruns.) 427.

assignment of the mortgage subject to redemption, or by a deposit of the mortgage and other title deeds in which case it will be an equitable sub-mortgage (*p*). Under a sub-mortgage nothing can be recovered from the original mortgagor in excess of the amount due on the mortgage, and on payment of that amount the sub-mortgagee must deliver up the mortgage to the original mortgagor.

Discharge of
sub mort-
gage.

It is doubtful if a sub-mortgagee can give a valid discharge, assignment or reconveyance. It is advisable in such a case to re-assign the mortgage security to the original mortgagee and to have him execute the discharge or reconveyance.

Sub-mort-
gagee liable
to account
to his
assignor.

Where a derivative mortgagee, by representing himself to be the owner of the mortgage, obtained a release of the equity of redemption which he afterwards sold for more than was due to him from his assignor, it was held that he was bound to account to the assignor for the profit (*q*).

Action by
sub-mort-
gagee
against his
assignor.

If a sub-mortgage contains no covenant for payment an action cannot be maintained by the assignee against the assignor unless there is evidence of a loan. Thus where a mortgagee in consideration of \$530, acknowledged to be paid, assigned to the plaintiff a mortgage for \$360 with a proviso that the assignment should be void on payment of the \$530 and interest, but the assignor did not covenant to pay, it was held that no action could be maintained for the mortgage debt (*qq*).

Mortgagee a
surety if he
covenants
with
assignee
to pay.

Where an assignor covenants to pay the mortgage moneys to the assignee if default be made by the mortgagor, the assignor thereby becomes a surety, and may be discharged if the assignee by agreement gives time for payment to the mortgagor without reserving the rights of the surety; and where the agreement is a material alteration of the original contract, as for example if it contains a

(*p*) *Ex parte Smith* (1842) 2 M.D. & DeG. 587.

(*q*) *McLean v. Wilkins* (1887) 14 S.C.R. 22.

(*qq*) *Pearman v. Hyland* (1862) 22 U.C.R. 202; see also *Hall v. Morley* (1853) 8 U.C.R. 584.

stipulation for an increased rate of interest, the surety is discharged notwithstanding the reservation of his rights (*r*).

But if the assignee takes a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage, that will not be sufficient to discharge the assignor (*s*).

An assignor is not liable to the assignee for the costs of an unsuccessful action to enforce the security. Thus where the assignee brought a foreclosure suit upon a mortgage for £350, on which only £250 had been in fact advanced, and the court disallowed the additional £100 and the costs of the suit, it was held that he could not recover these costs from his assignor, upon the covenant for validity of the security (*t*).

The assignor of a mortgage is liable to the assignee on a covenant that the mortgage is a valid and subsisting security, if before the assignment the lands have been sold for taxes (*u*).

Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and the assignee that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenants, it was held that he was entitled to a lien therefor as against the mortgagor (*v*).

Liability of assignor for costs.

Mortgagee entitled to a lien on the lands for money paid to the assignee.

(*r*) *Bristol & West of England Land Co. v. Taylor* (1893) 24 Ont. 286; *Trust Corporation of Ontario v. Hood* (1896) 23 Ont. App. 589.

(*s*) *Trusts Corporation of Ontario v. Hood* (1896) 23 Ont. App. 589.

(*t*) *Sturgess v. Bitner* (1861) 11 U.C.C.P. 102.

(*u*) *Real Estate Investment Company v. Metropolitan Building Society* (1883) 3 Ont. 476.

(*v*) *Fleming v. Palmer* (1866) 12 Gr. 226.

CHAPTER XXIV.

RIGHTS OF EXECUTORS, ADMINISTRATORS, HEIRS AND DEVISEES OF MORTGAGEE.

Personal
representa-
tive entitled
to mortgage
money.

The executor or administrator, and not the heir of a mortgagee in fee, is entitled to the money secured by the mortgage (a).

Independently of statute, a general devise of lands, unless a contrary intention appears from the will, passes the legal estate in lands vested in the testator as mortgagee (b).

Prior to the *Devolution of Estates Act* (c) the estate of the mortgagee in the mortgaged lands devolved on the death of the mortgagee upon his heir.

*Devolution
of Estates
Act.*

In Ontario much doubt and confusion has been created by the *Devolution of Estates Act*, and in some cases it is difficult to determine in whom the legal estate becomes vested upon the death of the mortgagee. Formerly in the case of a mortgagee dying before the 4th day of May, 1891, the mortgaged lands devolved upon the heir who was the proper person to reconvey. Section 11 of the *Act respecting Mortgages of Real Estate* (cc) empowered the executor or administrator, on payment of the mortgage moneys, to discharge the mortgage, but the legal estate remained vested in the heir who, it seems, still had power to reconvey. Section 4 of the *Devolution of Estates Act* provides that all real estate vested in any person dying after the 1st day of July, 1886, shall on his death notwithstanding any testamentary disposition devolve upon and

- (a) *Thornborough v. Baker* (1675) 3 Swanst. 628; 18 R.C. 231.
- (b) *In re Stevens' Will* (1868) L.R. 6 Eq. 597.
- (c) R.S.O. (1897) c. 127.
- (cc) R.S.O. (1897) c. 121.

become vested in his legal personal representatives, who under section 10, while the estate remains in them, shall be deemed in law his heirs (*d*). Under section 13 real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by the executor or administrator within twelve months after the death of the testator or intestate, and against which no caution has been registered, shall be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto as such devisees or heirs, without any conveyance from the executors or administrators. If the mortgagee dies intestate the legal estate will not devolve on devisees; nor will it devolve on the heir beneficially entitled as such heir, because if the heir succeeds at all he is a trustee for those entitled to the mortgage moneys, namely, the next of kin and, therefore, he cannot be beneficially entitled as heir.

As no one can succeed as heir or devisee, beneficially entitled as such, the legal estate will probably remain in the administrator. If, as has been suggested, "devisees or heirs beneficially entitled as such devisees or heirs" means persons entitled by law then the legal estate will devolve upon the next of kin.

Formerly if the mortgagee died during the currency of the mortgage there was often some inconvenience in the matter of reconveyance. On the death of the mortgagee his executor or administrator became entitled to the moneys secured by the mortgage as personalty, and the mortgaged lands devolved upon the heir-at-law in the absence of any disposition thereof by the mortgagee. In such a case the heir became trustee of the lands for the person entitled to the moneys and was the person to reconvey to the mortgagor on payment of the moneys.

Reconvey-
ance by
heir.

(*d*) The expression "legal personal representatives" or "personal representatives" means executors or administrators in their official capacity unless a different meaning is given to it by the context: *Stockdale v. Nicholson* (1867) L.R. 4 Eq. 359.

**Executor or
administrator may now
reconvey.**

This inconvenience was remedied by section 11 of the *Act respecting Mortgages of Real Estate* (e) whereby the executor or administrator of a deceased mortgagee is empowered on payment to him of the money due on the mortgage to convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land. The section is as follows :—

11. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the person having the mortgagee's estate.

**Two or more
mortgagors.**

Where there are two or more mortgagees entitled to the mortgage moneys on a joint account the survivors, or the last survivor of them, or the personal representatives of the last survivor may by receipt in writing give a complete discharge for the moneys due. This is provided by section 13 of the *Act respecting Mortgages of Real Estate* (f) which is as follows :—

13. (1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly and not in shares—the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(e) R.S.O. (1897) c. 121.

(f) R.S.O. (1897) c. 121.

This section applies only to a mortgage, obligation or transfer made after the 1st day of July, 1886, and only if and so far as a contrary intention is not expressed in the mortgage, obligation or transfer, and shall have effect subject to the terms of the mortgage, obligation or transfer, and to the provisions therein contained (g).

Mortgages
made after
1st July,
1886.

This section should be read in connection with section 76 of the *Registry Act* (h) which provides that a certificate of discharge executed by a person entitled to receive the money and to discharge the mortgage shall operate as a reconveyance. The effect of these two enactments is to give the surviving mortgagees or assignees, or the last survivor of them, or the personal representatives of the last survivor power to discharge the mortgage and reconvey the legal estate (i).

Section 12 of the *Act respecting Mortgages of Real Estate* (j) provides as follows:—

12. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators, or assigns, or any of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with the *Registry Act*, be valid, to all intents and purposes whatsoever.

Under this section it was held that a discharge executed by two of three executors was valid to release a mortgage made to their testator (k). This decision probably rests on the ground that one of several executors can receive and discharge debts due to their testator.

But where a mortgagor who was one of the mortgagee's executors executed a discharge of the mortgage made by himself its validity was questioned (l). And where one

Executor
discharging
his own
mortgage.

(g) Sub-ss. 2, 3.

(h) R.S.O. (1897) c. 136.

(i) *Dilke v. Douglas* (1880) 5 Ont. App. 63.

(j) R.S.O. (1897) c. 121.

(k) *Ex parte Johnson* (1875) 6 P.R. 225.

(l) *McPhadden v. Bacon* (1867) 13 Gr. 591.

executor gave a mortgage to his co-executor to secure a debt due by him to the estate and after the death of his co-executor executed a discharge of his own mortgage it was held to be ineffectual (*m*).

Foreign
adminis-
trator.

Executor
cannot
reconvey
mortgaged
lands unless
devised to
him.

Executors
and adminis-
trators may
sue and
be sued.

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him and a release by the heirs are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the *Quieting Titles Act* (*n*).

In New Brunswick it has been held that an executor cannot assign the legal estate in land mortgaged in fee to his testator, unless the land is devised to him. Without such devise his assignment will operate only as a transfer of the mortgage debt (*o*).

In Nova Scotia it is provided that—

2. All deeds of lands heretofore or hereafter made under suit, heretofore or hereafter to be instituted for the foreclosure of mortgages by the executors or administrators of mortgagees shall be as good, valid, and effective at law as if brought by the heirs-at-law of such mortgagee or said heirs had joined in such suits (*p*).

Executors and administrators under Ontario Rule 193 may sue and be sued as representing the property or estate of which they are representatives. The Rule is as follows :—

193. Trustees, executors and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the Court or a Judge may at any time order any of them to be made parties in addition to, or in lieu of, the previous parties.

In a suit brought by the executors of a mortgagee for foreclosure it was held that the heirs of the deceased mortgagee or the persons beneficially entitled under his will were not necessary parties (*q*).

(*m*) *Beatty v. Shaw* (1886) 13 Ont. 21; 14 Ont. App. 600.

(*n*) *In re Thorpe* (1868) 15 Gr. 76; R.S.O. (1897) c. 135.

(*o*) *Doe d. Slason v. Hanson* (1857) 3 All. (New Bruns.) 427.

(*p*) 48 Viet. (N.S.) (1885) c. 32, s. 2.

(*q*) *Lawrence v. Humphries* (1865) 11 Gr. 209.

As a general rule the executor or administrator of a deceased mortgagee may as regards realizing the security and reconveying the estate exercise all the rights and powers which the mortgagee might have exercised, if living.

In case of a bequest of a mortgage indebtedness to the mortgagor, the executors may be compelled to discharge the mortgage before payment by the mortgagor of his other indebtedness to the estate (*r*).

(*r*) *Archer v. Severn* (1886) 12 Ont. 615; 14 Ont. App. 723.

Rights generally of executor or administrator.

Bequest of mortgage indebtedness

CHAPTER XXV.

RIGHTS OF EXECUTION CREDITORS OF MORTGAGEE.

Interest of a
mortgagee
eligible in
execution.

The estate, right, title and interest of a mortgagee under a registered mortgage of land may be seized under a writ of execution against the mortgagee.

This is provided by the following sections of the *Execution Act* (a):—

23. (1) The word "plaintiff" or the word "creditor" in this section includes any person named in a writ of execution as the person for whom the levy is to be made. The word "defendant" or the word "debtor" includes any person of whose property the money is directed to be levied.

Sheriff may
give notice
of seizure to
registrar.

(2) In case a sheriff to whom a writ of execution is addressed is informed on behalf of the plaintiff, that the defendant is a mortgagee of land and that the mortgage is registered, or that the defendant is entitled to receive a sum of money charged upon lands by virtue of any registered instrument, and in case the sheriff is required on behalf of the plaintiff to seize the mortgage or charge, and is furnished in writing with the information necessary to enable him to give the notice hereinafter mentioned, he shall, upon payment of the proper fees, forthwith deliver or transmit to the Registrar or Master of Titles in whose office the mortgage or other instrument is registered, a notice in the form or to the effect following:—

Form of
notice.

To the Registrar of (or as the case may be):

By virtue of a writ of *scire facias* to me directed and issued out of the High Court of Justice at —— (or the County Court of the County of ——), whereby I am commanded to levy against the goods and chattels of A.B. the sum of \$—— for debt, and \$—— for costs lately adjudged to be paid by the said A.B. to C.D., besides the costs of executions, I have this day seized and taken in execution all the estate, right, title and interest of the said A.B. in a certain mortgage made by X. to the said A.B., and which bears date on the —— day of —— and was registered in the registry office for the County of —— on the —— day of —— A.D. ——, as number (or the said mortgage or other instrument may be described in any other manner by reference to dates, parties and the land covered as will enable the notice to be recorded upon the lands therein described) and in the moneys secured thereby, and this notice is given for the purpose of binding the interests of the said A.B. under sections 23 to 28 of the *Execution Act*.

Dated this —— day of ——

(signed) M.N.

Sheriff of the County of ——

(a) R.S.O. (1897) c. 77.

(3) Upon registration of the said notice, the interest of the execution debtor in the mortgage or other instrument, and in the lands therein described, and in the moneys thereby secured and in all covenants and stipulations for the securing of payment thereof, shall be bound by the execution, and such registration shall be deemed to be notice of the said execution and seizure to all persons who may thereafter in any way acquire any interest in the mortgage, lands, moneys, or covenants; and the rights of the sheriff and execution creditor shall have priority over the rights of all such persons, subject as regards the mortgagor or person liable to pay the money secured by the mortgage or charge, to the next section of this Act.

24. (1) A notice similar to the notice mentioned in the next preceding section or containing the like information shall also be served upon the mortgagor or upon the person who is liable to pay the moneys secured by the registered instrument; and upon such service the person served shall pay to the sheriff all moneys payable or which may become payable to the execution debtor.

(2) Service of such notice may be made personally, or by leaving the same at the dwelling-house of the person to be served with a grown up person dwelling there, or by registered letter to the proper address of the person to be served.

(3) Any payment made after service of the notice or after actual knowledge of the seizure shall be void as against the sheriff and execution creditor.

25. In addition to the remedies herein provided, the sheriff may bring an action on such mortgage or other instrument for the sale or foreclosure of the lands covered by the mortgage or other instrument, and shall be entitled to a bond of indemnity as in the cases provided for in section 21.

26. Upon a writ of execution, notice whereof is registered under section 23, expiring or being satisfied, set aside or withdrawn, a certificate of such fact by the sheriff or the execution creditor, or the order to set aside, as the case may be, may be registered and thereupon such seizure shall be vacated and deemed at an end.

27. The order of court or the certificate of the sheriff shall not require verification. The certificate of the execution creditor shall be verified by the oath of a subscribing witness as in the case of other instruments affecting lands.

28. For the registration of any notice under section 23, or of a certificate under section 26, the registrar or Master shall be entitled to a fee of 50 cents; and for every notice of seizure under section 23 of this Act, the sheriff shall be entitled to a fee of \$1.

These provisions were first enacted in 1893 (b).

Formerly the interest of a mortgagee in the mortgaged premises could not be sold under an execution against the mortgagee, even after the mortgage had

Upon registration of notice interest of mortgagee bound.

Notice to mortgagor.

How served.

Payments made after notice void.

Sheriff may bring action for sale or foreclosure.

Certificate vacating seizure.

Fees.

Formerly interest of a mortgagee could not be sold under execution.

become forfeited by non-payment of the mortgage money (c).

Nova Scotia:
receiver will
not be
appointed
where the
remedy by
execution is
adequate.

In Nova Scotia the interest of a mortgagee under a mortgage is bound by a recorded judgment and may be sold thereunder. Thus where the plaintiff company recovered several judgments upon which executions were issued, and the company made application to a judge in chambers for the appointment of a receiver to receive the rents, interest and profits to which the judgment debtor might become entitled by virtue of a mortgage which he held upon certain lands, the mortgage not being yet due, it was held that the court should not appoint a receiver by way of equitable execution, merely because it would be a more convenient way of obtaining satisfaction of the judgment than the ordinary modes of execution; that the legal title to the land being in the defendant the judgments, when recorded, would clearly bind such interest and that there was nothing to prevent the sale of such interest under execution in accordance with the provisions of R.S.N.S., 5th ser., chapter 124, in the same way as any other interest of a judgment debtor in real estate (d).

**New
Brunswick:**
money
secured by
mortgage
may be
attached and
sheriff may
discharge the
mortgage;

and act on
the power
of sale.

In New Brunswick the estate of a mortgagee in fee, who has not taken possession of the land, is not seizable in execution on a judgment against him (e). But money secured by mortgage on real estate, or any interest therein, may be attached and dealt with on attachment in the same mode as real estate, or any interest therein. And where the money due on any security on real estate is collected by a sheriff he may give a discharge under his hand and seal, duly acknowledged, which, when registered, shall operate as a discharge of such security (f). The

(c) *Doe d. Campbell v. Thompson* (1843) H. T. 6 Viet. R. & J. Dig. 1433; *Pache v. Riley* (1866) 3 E. & A. 215, 231; *Lodor v. Creighton* (1860) 9 U.C.C.P. 295.

(d) *N.S. Mining Co. v. Greener* (1898) 31 N.S.R. 189.

(e) *Doe d. Vernon v. White* (1859) 4 All. (New Bruns.) 314.

(f) C.S.N.B. (1877) c. 42, s. 23.

sherriff if authorized to collect such security on real estate may act under any power of sale contained therein, and on sale may execute a deed to any purchaser, which when acknowledged shall be as effectual as if such power of sale had been exercised by the person holding the security (g).

In Manitoba a mortgage may be seized and sold under an execution against the mortgagee and the purchaser will acquire the interest of the mortgagee therein (h).

In the North-West Territories a mortgage may be seized under a writ of execution and assigned by the sheriff to the creditor at the sum actually due thereon, or the sheriff may collect the amount due from the mortgagor (i).

Manitoba:
mortgage
security may
be sold.

North-West
Territories:
mortgage
may be
seized and
assigned
to the
creditor.

(g) C.S.N.B. (1877) c. 42, s. 24; see also C.S.N.B. (1877) c. 47, s. 5, and c. 43, s. 31 *et seq.*

(h) R.S. Man. (1891) c. 53, s. 22.

(i) Consolidated Ordinances N.W.T. (1898) c. 21, s. 359.

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PART IV.

RIGHTS AND LIABILITIES OF THE MORTGAGOR.

CHAPTER XXVI.

RIGHTS OF MORTGAGOR GENERALLY.

Nature of
mortgagor's
interest in
mortgaged
lands.

At common law when a mortgage of lands was made the legal estate became vested in the mortgagee and all that remained in the mortgagor was a mere right to re-enter on repayment of the money or performance of the condition. The mortgagor retained no estate in the lands, but the whole estate became vested in the mortgagee. If the mortgagor made default in payment his right of re-entry was forfeited and the mortgagee became the absolute owner.

Equity of
redemption
is an estate.

Courts of equity, however, regarded the forfeiture of the right to re-enter on breach of the condition as in the nature of a penalty against equity should relieve which, and consequently restored to the mortgagor after default his right to re-enter on payment of the amount due. This was termed the right or equity of redemption. But for some time after the right to redeem was established even courts of equity treated the mortgagor's interest in the lands as a mere right and not as an estate. The practice, however, grew of regarding and dealing with the mortgagor's interest as an estate that could be devised, granted or entailed, until at length it was decided in the case of *Casborne v. Scarfe*(a) that a mortgagor has in equity not merely a right of entry on performance of the condition, but an alienable and devisable estate in the mortgaged lands. In that case it was argued that the mortgagor's interest was not an actual estate but only a

(a) (1737) 1 Atk. 603.

power of getting an estate, a mere right to bring an action at law or a suit in a equity to have the estate re-conveyed on payment of the amount due. Lord Chancellor Hardwicke in delivering judgment said:—

“An equity of redemption has always been considered as an estate in the land; for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land.”

It is now the established doctrine of equity that the mortgagor until foreclosure is the real owner of the property and possessed of it in right of his ancient and original estate (b).

Formerly the interest of the mortgagor, before default, was termed a right of re-entry on performance of the condition. If the condition was performed the right was enforceable in courts of law. After default it was called an equity of redemption and was enforceable only in courts of equity. Now however it is customary when referring to the estate of an owner of mortgaged lands to term it an equity of redemption whether before or after default.

An equity of redemption being an estate in land will devolve on the death of the owner in the same way as the estate in fee simple would have devolved.

An equity of redemption is subject to tenancy by the courtesy (c); but being an equitable estate was not subject to dower until made so by statute (d).

A mortgagor being in equity the owner of the mortgaged property may without the consent or concurrence

Right of
re-entry
before
default.

Devolution
of equity of
redemption.

Tenancy by
the courtesy.

Dower.

Equity of
redemption
may be sold
or mortgaged

(b) *Heath v. Pugh* (1881) 6 Q.B.D. 345; *Tarn v. Turner* (1888) 39 Ch. D. 456; 18 R.C. 373.

(c) *Casborne v. Scarfe* (1737) 1 Atk. 603; see *Moore v. Jackson* (1892) 19 Ont. App. 383.

(d) R.S.O. (1897) c. 164, s. 2. In Manitoba and the North-West Territories tenancy by the courtesy no longer exists; see R.S. Man. (1891) c. 45, s. 20; 57-58 Vict. (D.) (1894) c. 28, s. 7.

rence of the mortgagee sell or mortgage the equity of redemption or any rights incident thereto (e).

Possession.

A mortgagor is not entitled to possession of the mortgaged lands unless that right is reserved to him (f); but it is customary to insert a provision that the mortgagor shall be entitled to remain in possession until default. And where notwithstanding the omission of the re-demeise clause it sufficiently appeared from the provisions of the mortgage itself and the course of dealing that it was the intention of the parties that the mortgagor should retain possession until default, the mortgagees were enjoined from disturbing the mortgagor's possession until such default (g).

**Mortgagor
not account-
able for
rents.**

But a mortgagor is not accountable to the mortgagee for rents and profits received while in possession, though the security proves deficient (h); nor is he in general liable for waste (i).

**Growing
crops.**

A mortgagor is entitled even after default and before entry of the mortgagee to remove growing crops (j).

**Mortgagor
may bring or
defend
actions.**

A mortgagor in possession may bring or defend actions in respect of the mortgaged property against persons other than the mortgagee (k). As a general rule the mortgagee having the legal estate must be made a party to such actions (l), especially if his interests are in any way likely to be affected by the result of the action (m);

(e) *Steers v. Rogers* [1893] A.C. 232.

(f) *Moss v. Gallimore* (1779) Douglas 279.

(g) *Superior Savings and Loan Society v. Lucas* (1879) 44 U.C.R. 106.

(h) *Ex parte Wilson* (1813) 2 V. & B. 252; *Wafer v. Taylor* (1852) 9 U.C.R. 609.

(i) *Wafer v. Taylor* (1852) 9 U.C.R. 609.

(j) *In re Phillips* (1880) 16 Ch. D. 104.

(k) *Sellick v. Smith* (1826) 11 Moore 459.

(l) *Wood v. Williams* (1819) 4 Madd. 186; 20 R.R. 291.

(m) *Van Gelder, Apsimon & Co. v. Sowerby Bridge etc. Co.* (1890) 44 Ch. D. 374.

but not if the mortgagee cannot possibly be affected by the result (n).

Sub-section 4 of section 58 of the *Ontario Judicature Act* (o) provides as follows:—

58. (4) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person (p).

Mortgagor
may now sue
in his own
name.

Formerly a mortgagor could not maintain an action for an injury done to the land if the mortgage was in default (q). But the mortgagor of a property with a clause for the retaining possession until default (such default not having taken place) was entitled, so long as the mortgage continued in force without default, to maintain an action for an injury done to the reversion (r).

Formerly
could not
sue if the
mortgage
was in
default.

Independently of the *Ontario Judicature Act* a mortgagor is entitled, if necessary, to take proceedings in the name of the mortgagee to recover or protect the mortgaged property upon giving proper indemnity as to costs (s).

Mortgagor
may sue
on giving
indemnity.

Under section 58 above quoted it was held that Trespass. a mortgagor, entitled to the possession of land as to which the mortgagee had given no notice of his intention to take possession, could sue to prevent or recover damage in respect of any trespass or other wrong relative thereto,

(n) *Hughes v. Cook* (1865) 34 Beav. 407; *Pearse v. Hewitt* (1835) 7 Sim. 471; *Fairclough v. Marshall* (1878) 4 Ex. D. 37; *In re Nickle & Walkerton* (1886) 11 Ont. 433.

(o) R.S.O. (1897) c. 51.

(p) This provision is substantially the same as that of the English Judicature Act, 1873, 36 & 37 Vict. (Imp.) c. 66, s. 25 (5). In Nova Scotia R.S.N.S. (1884) c. 104, s. 13 (4). In Manitoba 58 & 59 Vict. (Man.) (1895) c. 6, s. 39 (4). In the North-West Territories Consolidated Ordinances (1898) c. 21, s. 10 (4).

(q) *Ford v. Jones* (1862) 12 U.C.C.P. 358.

(r) *Rogers v. Dickson* (1861) 10 U.C.C.P. 481.

(s) *Phené v. Gillan* (1845) 5 Ha. 1.

in his own name only, and that the objection that the mortgagees should be parties ought not to prevail (*t*).

Under the Nova Scotia *Judicature Act* the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, even although after the trespass and before action brought he has parted with his equity (*u*).

May restrain
mortgagee
from com-
mitting
waste.

Right to
inspect title
deeds.

Mortgagor
may be
discharged
from liability

Reservation
of rights.

A mortgagor of a term may restrain a mortgagee in possession from committing waste even although the mortgagee has obtained the consent of the reversioner (*v*).

The mortgagee is entitled to the possession of all title deeds of the mortgaged lands, and formerly the mortgagor was not entitled even to inspect them. But now under the *Act respecting Mortgages of Real Estate* (*w*) the mortgagor, so long as his right to redeem subsists, may inspect the title deeds.

The provision is as follows:—

3. (1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Where the mortgagor has conveyed away his equity of redemption he may be discharged from liability under his covenant for payment if the mortgagee deals with the purchaser of the equity of redemption to the prejudice of the mortgagor, as, for example, if the mortgagee extends the time for payment (*x*). But if in such an agreement to extend the time for payment the rights of the mortgagor are

(*t*) *Platt v. Grand Trunk Railway Co.* (1886) 12 Ont. 119.

(*u*) *Brookfield v. Brown* (1893) 22 S.C.R. 398; see also *McMullen v. Free* (1887) 13 Ont. 57.

(*v*) *Chisholm v. Sheldon* (1850) 1 Gr. 318.

(*w*) R.S.O. (1897) c. 121, s. 3, sub-s. 1.

(*x*) *Mathers v. Helliwell* (1863) 10 Gr. 172; *Aldous v. Hicks* (1891) 21 Ont. 95; *Trust and Loan Co. v. McKenzie* (1896) 23 Ont. App. 167; *McCuaig v. Barber* (1898) 29 S.C.R. 126.

expressly reserved he will not be discharged (*y*). And so where the dealings do not amount to a new contract and there is no binding agreement to extend the time for payment the right of action will not be impaired (*z*).

In *McCuaig v. Barber* (*a*), an action on the covenant for payment, the defendant a mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage, which he assigned to the plaintiff the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser of the equity the benefit of similar covenants from sub-purchasers, and agreed to exhaust her remedies against the latter before suing the purchaser. It was held that the mortgagee being the sole owner of the covenant of the purchaser of the equity with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and the purchaser. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

The foundation of the mortgagor's right to be discharged as contained in these cases may be stated as follows:—The mortgagee's right to sue on the covenant and the mortgagor's right to have the mortgaged estate restored to him on payment are reciprocal, and if the mortgagee by his dealings has divested himself of the power to restore the estate to the mortgagor unimpaired, the liability of the mortgagor on the covenant is at an end.

A mortgagor is entitled to a release of the mortgage debt if the mortgagee purchases the equity of redemption under a writ of execution against the lands (*b*).

Why
mortgagor
discharged
by acts of
mortgagee.

(*y*) *Trust and Loan Co. v. McKenzie* (1896) 23 Ont. App. 167.

(*z*) *Aldous v. Hicks* (1891) 21 Ont. 95.

(*a*) (1898) 29 S.C.R. 126.

(*b*) R.S.O. (1897) c. 77, s. 32.

CHAPTER XXVII.

REDEMPTION.

i. When the Right to Redeem arises.

When right
to redeem
arises.

Mortgage not
redeemable
before day
named.

Statutory
exception
after five
years.

Three
months,
interest.

The right of a mortgagor to redeem arises when the time arrives for payment of the mortgage moneys or performance of the condition. The period must be ascertained or ascertainable by reference to a fixed day or to the happening of a certain event. If the time be uncertain or of unreasonable duration redemption may be decreed in a reasonable time (a).

As a general rule a mortgage is not redeemable before the day thereby fixed for payment of the mortgage moneys, though the full amount of principal and interest up to that day be offered to the mortgagee (b). But redemption was allowed before the day named for payment where by the proviso the mortgagor was entitled to redeem on the day named or on payment before or after it (c).

An exception to this rule is made by section 7 of the *Act respecting Interest* (d) by which in the case of a mortgage made after the 1st day of July, 1880, for a term exceeding five years the mortgagor is entitled at any time after the expiration of five years from the date of the mortgage to pay the amount then due upon the condition of paying three months' interest in addition.

The *Act respecting Interest* provides as follows:—

7. Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if at

(a) *Newcomb v. Bonham* (1681) 1 Vern. 7.

(b) *Brown v. Cole* (1845) 14 Sim. 427.

(c) *Harding v. Tingey* (1865) 10 Jur. N.S. 872.

(d) R.S.C. (1886) c. 127.

any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the four sections next preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage (d).

Section 8 is as follows:—

8. The provisions of the five sections next preceding shall only apply to moneys secured by mortgage on real estate executed after the first day of July in the year one thousand eight hundred and eighty (e).

Under section 7, where a mortgage is given to secure the balance of purchase money, the principal being payable in instalments extending beyond five years, the mortgagor is, at any time after such last named period, entitled to a discharge upon payment of the principal and interest, together with three months' additional interest (f).

By a subsequent statute this provision is amended and declared not to apply to any mortgage on real estate given by a joint stock company or other corporation (g).

A Welsh mortgage from the nature of the contract may be redeemed at any time. Welsh
mortgage.

If a mortgage is made payable on demand, or if no time is fixed for payment, as in the case of an equitable mortgage by deposit of title deeds or other informal mortgage, the mortgagor may redeem at any time, as the mortgagee has the correlative right at any time to call in the loan (h). Mortgage
payable on
demand.

(d) R.S.C. (1886) c. 127, s. 7.

(e) See also R.S.O. (1897) c. 205, s. 25 as to loan corporations.

(f) *In re Parker, Parker v. Parker* (1894) 24 Ont. 373; 30 C.L.J. 140.

(g) 53 Vict. (D.) (1890) c. 34, s. 1 is as follows: 1. Provided however, that nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment of which security has been given by way of mortgage on real estate.

(h) *Fitzgerald's Trustee v. Mellersh* [1892] 1 Ch. 385.

Mortgagee taking possession before day named.

Sixth months' notice.

Ground of rule requiring six months' notice.

Six months' interest in lieu of notice.

Option to pay before maturity may be exercised without notice after default.

*If a mortgagee enter into possession before the day named for payment the mortgagor may thereupon redeem (i).

Although the mortgagee may bring an action against the mortgagor to recover the mortgage moneys at any time after they become due without notice this right is not reciprocal.

As a general rule a mortgagor must, after default in payment by the day fixed, give to the mortgagee six months' notice of his intention to pay off the mortgage, or pay six months' interest in lieu of notice (j).

This rule is founded on the equitable maxim that "he who seeks equity must do equity," and a mortgagor who comes into equity for relief after his estate is forfeited at law is required as the price of redemption to deal equitably by his mortgagee and give him a reasonable time to find a new investment for his moneys (k).

A mortgagor may, at any time after default, redeem the mortgage without notice if he is willing to pay six months' interest in lieu of notice (l).

But where the mortgage deed reserves an option to the mortgagor to pay off the mortgage moneys or any part thereof at any time before the expiration of the mortgage, and the parties after the maturity of the mortgage continue to deal upon its terms as far as applicable, the option may still be exercised by the mortgagor after the maturity of the mortgage, and the mortgagee is not entitled to six months' notice (m).

(i) *Bovill v. Endle* [1896] 1 Ch. 648.

(j) *Smith v. Smith* [1891] 3 Ch. 550; 18 R.C. 119; *Archbold v. Building and Loan Association* (1888) 15 Ont. 237.

(k) *Browne v. Lockhart* (1840) 10 Sim. 420.

(l) *Hutton v. Brown* (1881) 45 L.T. 343; *Johnson v. Evans* (1889) 61 L.T. 18.

(m) *Archbold v. Building and Loan Association* (1888) 16 Ont. App. 1; *Banner v. Berridge* (1881) 18 Ch. D. 254.

If, however, a mortgagee demands payment or takes any steps to enforce his security he will not be entitled to notice or interest in lieu of notice (*n*).

No notice required if mortgagee takes proceedings.

If in an action of foreclosure upon a mortgage, which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, the mortgagee claims the benefit of the clause and calls in the whole mortgage debt, he is bound by his election and must accept principal, interest, and costs, whenever tendered, even though he does not seek a personal order for immediate payment (*o*).

If a demand is made by the mortgagee or a notice is given requiring payment of the mortgage moneys, or any part thereof, the mortgagee must accept payment made according to the terms of the notice or demand (*p*).

Mortgagee must accept payment if made in pursuance of demand.

Where a railway company expropriates mortgaged land under its powers for so doing, the mortgagee may insist on six months' notice in lieu of interest (*q*).

Railway expropriating mortgaged lands.

If six months' notice is given and the money is not paid on the very day of the expiration of the notice the mortgagee may require a further six months' notice or interest in lieu of notice (*r*).

In a case in England an order for foreclosure was made in the usual form, and the usual certificate also was made appointing the last day of six calendar months from the date of the certificate as the time for redemption, on payment of the principal money with interest up to that day and costs; and it was held that the mortgagor could

Redemption before day appointed by the court.

(*n*) *Lett v. Hutchins* (1871) L.R. 13 Eq. 176; *Bovill v. Endle* [1896] 1 Ch. 648; *Re Houston, Houston v. Houston* (1882) 2 Ont. 84.

(*o*) *Cruso v. Bond* (1882) 1 Ont. 384, overruling *Drummond v. Guickard*, cited in *Green v. Adams* (1867) 2 Ch. Ch. 134.

(*p*) R.S.O. (1897) c. 121, s. 32.

(*q*) *Spencer-Bell v. London & Southwestern Railway Co.* (1885) 33 W.R. 771.

(*r*) *In re Moss, Levy v. Sewill* (1885) 31 Ch. D. 90; *Garforth v. Bradley* (1755) 2 Ves. Sen. 675, at p. 672.

not claim to redeem on an earlier day, on payment of the principal money with interest up to the time of payment only and the costs (s).

But an equitable mortgagee by deposit of title deeds is not entitled to six months' notice or to interest in lieu of notice (t.)

Ontario
mortgages
made after
July 1st,
1888:
notice not
required.

In Ontario the mortgagor in all mortgages made after the 1st day of July, 1888, is entitled in the absence of express stipulation to the contrary to pay off the mortgage at any time after it becomes due without notice and without paying interest in lieu of notice. This is provided by section 17 of the *Act respecting Mortgages of Real Estate* (u) which is as follows:—

17. (1) Where default has been made in the payment of any principal money secured by any mortgage made subsequent to the 1st day of July, 1888, according to the terms and conditions thereof, the same may be paid at any time thereafter without previous notice to the person entitled to receive the same, and without the payment of any interest in lieu of such notice; Provided always, that if in or by the said mortgage or otherwise there has been any express agreement with respect either to such notice or to interest to be paid in lieu thereof, such agreement shall be binding and have the same effect as if this section had not been passed; provided moreover, that this section shall not be held as applying to any default in the payment of principal money that may have become due or payable only by reason of some default made in the payment of interest money secured or payable by or under any such mortgage, or by reason of some default made in the payment of any instalment of principal money, or any portion of any instalment of principal money secured or payable by or under any such mortgage, but shall be held as applying to any such instalment in respect of which default has been made as aforesaid.

Manitoba.

Redemption
where mort-
gaged lands
without the
jurisdiction.

In Manitoba the statutory provisions are as follows:—

4. The rule of law under which a mortgagee is entitled to demand and receive notice or a bonus of six months' interest, in case the principal of his mortgage be not paid on the day it falls due, is hereby repealed and declared not to be in force in the Province of Manitoba: Provided that this section shall not be construed to affect any contract (v).

ii. Jurisdiction.

There does not appear to be any reported case in which the court has decreed redemption of mortgaged lands in

(s) *Hill v. Rowlands* [1897] 2 Ch. 361.

(t) *Fitzgerald's Trustee v. Mellersh* [1892] 1 Ch. 385.

(u) R.S.O. 1897, c. 121.

(v) R.S. Man. (1891, c. 99, s. 4.

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a foreign jurisdiction, but the court has intimated that, if necessary, it would decree redemption in such a case (*w*). But the court will not grant relief by a decree *in personam* as to lands without the jurisdiction of the court unless there is some contractual obligation, express or implied, or some trust or equity between the parties. Thus the court refused a decree for redemption of a mortgage on lands in Manitoba at the suit of a judgment creditor of the mortgagor, whose judgment was by the Manitoba statute a charge upon the lands, the judgment creditor and the mortgagee both having domicile in Ontario. For the plaintiff's claim was under a statutory charge which did not create any equity enforceable *in personam* (*x*).

County Courts have jurisdiction to entertain actions for the redemption of any legal or equitable mortgage where the sum actually remaining due does not exceed \$200 (*y*).

Jurisdiction
of County
Courts.

iii. Who may Redeem.

The general rule is that no person shall be admitted to redeem unless he can show title to the estate of the mortgagor. As against persons having no interest in the equity of redemption the mortgagee is the owner; it is only in favour of the mortgagor or some one claiming under or through him that the court allows redemption (*z*).

Persons
having
interest in
the equity of
redemption.

An equity of redemption is an estate in the land, good in all cases unless the right to redeem has been barred by the Statute of Limitations. It exists as a right and an

Right to
redeem
absolute.

(*w*) *Bent v. Young* (1838) 9 Sim. 180; *Beckford v. Kemble* (1822) 1 S. & St. 7.

(*x*) *Henderson v. Bank of Hamilton* (1893) 20 Ont. App. 646; 23 S.C.R. 716; reversing judgment of Divisional Court, 23 Ont. 327; see *Burns v. Davidson* (1892) 21 Ont. 547; *Purdom v. Pavey* (1896) 26 S.C.R. 412; *Gunn v. Harper* (1899) 30 Ont. 650; *Norris v. Chambres* (1861) 29 Beav. 246, affirmed 3 DeG. F. & J. 583; *In re Hawthorne, Graham v. Massey* (1883) 23 Ch. D. 743; *British South Africa Co. v. Companhia de Moçambique* [1893]. A.C. 602.

(*y*) R.S.O. (1897) c. 55, s. 22 (12).

(*z*) *James v. Biou* (1819) 3 Swanst. 234.

estate over which the court has no discretionary power, and a person interested in the equity of redemption has an absolute right to redeem the mortgage (*a*).

In one case it was said:—

“ All that either the court or the mortgagee has to attend to is, that in fact the person tendering the money has an interest, whatever it may be, in the equity of redemption ” (*b*).

Mortgagor who has assigned may not redeem ; unless sued on the covenant.

Person contracting to purchase or lease.

Realty and personality subject to one mortgage.

Mortgage of two different estates.

The mortgagor so long as he remains the owner of the equity of redemption is entitled to redeem, but his right is gone as soon as he absolutely assigns his equity. If however the mortgagor be sued on the covenant to pay the mortgage debt after he has assigned the equity of redemption, his right to redeem revives and he is entitled, on payment, to a reconveyance to himself subject to any right to redeem that may be vested in other persons (*c*).

A person who has entered into a binding contract to purchase or take on lease the equity of redemption, or part thereof, is entitled to redeem ; but the right does not arise while the contract remains conditional (*d*).

Where a mortgage comprises both real and personal property a person who would be entitled to redeem either property, if mortgaged by itself, is entitled to redeem both (*e*).

Where the mortgage comprises two different estates, a person entitled to redeem one estate cannot bring an action for redemption without adding as parties the persons entitled to the equity of redemption in the other estate (*f*).

(*a*) *Martin v. Miles* (1883) 5 Ont. 404; *Hartley v. Burton* (1868) 3 Ch. 365.

(*b*) *Pearce v. Morris* (1869) 5 Ch. 227, at p. 230.

(*c*) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636.

(*d*) *Tasker v. Small* (1837) 3 My. & Cr. 63; *Pearce v. Morris* (1869) 5 Ch. 227; *Tarn v. Turner* (1888) 39 Ch. D. 456.

(*e*) *Hall v. Heward* (1886) 32 Ch. D. 430.

(*f*) *Palk v. Lord Clinton* (1805) 12 Ves. 48; *Marquis Cholmondeley v. Lord Clinton* (1820) 2 J. & W. 1, at p. 134.

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Where several persons are interested as tenants in common in the equity of redemption, any one of them is entitled to redeem the whole mortgaged property, and not merely a proportionate part. Thus where some of several tenants in common are barred by the *Statute of Limitations*, and others are not barred, the latter are entitled to redeem the whole estate (g). Where tenants in common mortgage an estate one cannot maintain an action for redemption without making the others parties (h).

If the person redeeming has only a partial interest in the equity of redemption the conveyance to him should be made expressly subject to the right of redemption of any other person interested (i).

Ontario Rule 193 provides that trustees, executors and administrators may sue and be sued as representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested. A trustee of the equity of redemption will sufficiently represent the trust estate in a redemption action (j). But the court may at any time order any of the beneficiaries to be made parties (k).

A reversioner or remainderman is not entitled to redeem a mortgage of the life estate during the subsistence of the tenancy for life (l).

The purchaser at a sheriff's sale of a reversion in lands mortgaged for a term of years is entitled to redeem the mortgage for his own benefit (m).

A tenant to whom a lease is made by the mortgagor Lessee for after the execution of the mortgage is a purchaser *pro* *years*.

Trustees,
executors or
administra-
tors.

(g) *Faulds v. Harper* (1886) 11 S.C.R. 639.

(h) *Bolton v. Salmon* [1891] 2 Ch. 48.

(i) *Pearce v. Morris* (1869) 5 Ch. 227.

(j) *Mills v. Jennings* (1880) 13 Ch. D. 639; *sub. nom. Jennings v. Jordan* (1881) 6 App. Cas. 698.

(k) Ont. Rule 193; *Stansfield v. Hobson* (1852) 16 Beav. 189; *Liddell v. Deacou* (1873) 20 Gr. 70.

(l) *Prout v. Cock* [1896] 2 Ch. 808.

(m) *Waters v. Shade* (1851) 2 Gr. 457.

tanto of the equity of redemption and is entitled to redeem the mortgage (*n*). The right of a tenant for years to redeem is absolute and the court has no discretion to grant or refuse redemption (*o*).

Where a tenant for years under a demise made subsequently to a mortgage sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the tenant was not a party, it was held that the tenant had a right to redeem in the event of the mortgagee's refusing to accept him as tenant (*p*).

Any person liable to pay the mortgage debt may redeem. Thus, a surety for payment of the interest has the right (*q*).

A judgment creditor is entitled to redeem if before the time fixed for redemption he has acquired a charge upon the lands (*r*). Creditors, other than judgment creditors, where the mortgagor is insolvent and his estate has become vested in an assignee for the benefit of creditors, may redeem if the assignee refuses to redeem.

Assignees of the equity of redemption including subsequent mortgagees are entitled to redeem; and they are admitted to redeem in the order in which they have acquired rights in the equity of redemption (*s*). But a subsequent mortgagee has no right to redeem a prior mortgagee unless both the subsequent mortgage and the

(*n*) *Canada Permanent Loan and Savings Society v. Macdonnell* (1875) 22 Gr. 461; *Martin v. Miles* (1883) 5 Ont. 404; *Keech v. Hall* (1778) 1 Doug. 21; *Tarn v. Turner* (1888) 39 Ch. D. 456.

(*o*) *Martin v. Miles* (1883) 5 Ont. 404.

(*p*) *Martin v. Miles* (1883) 5 Ont. 404.

(*q*) *Green v. Wynn* (1869) 4 Ch. 204; *Forbes v. Jackson* (1882) 19 Ch. D. 615.

(*r*) *Mildred v. Austin* (1869) L.R. 8 Eq. 220; *Earl of Cork v. Russell* (1871) L.R. 13 Eq. 210.

(*s*) *Beevor v. Luck* (1867) L.R. 4 Eq. 537; *Loveday v. Chapman* (1875) 32 L.T. 689.

Surety for
mortgage
debt.

Judgment
creditor.

Assignee of
equity of
redemption.

prior mortgage are overdue (*t*). A subsequent incumbrancer may in the same action redeem prior mortgages and foreclose subsequent incumbrancers and the mortgagor (*u*).

Where an equity of redemption of no value was assigned merely for the purpose of enabling the assignee to attack a prior mortgagee on the ground of fraud for the benefit of the assignor, and the assignee brought action to impeach the prior mortgage, and in the alternative for redemption, it was held that the assignment savoured of chamepertous

Redemption refused where assignment of mortgage chamepertous

The general rule is that a subsequent incumbrancer may make a prior mortgagee a party to his action only for the purpose of redeeming him; but where the prior mortgage is created by a deed absolute in form, the subsequent incumbrancer may bring the prior mortgagee before the court for the purpose of showing that his interest is redeemable, without offering to redeem him (*w*). And a subsequent incumbrancer in an action brought by him to redeem may impeach transactions by a prior mortgagee in reference to the mortgaged property (*x*).

Relief afforded to subsequent incumbrancer against prior mortgagee.

A subsequent incumbrancer bringing action against a prior mortgagee is not entitled to a sale (*y*), unless the prior mortgagee consents or does not object (*z*).

The general rule is that a subsequent incumbrancer bringing action against a prior mortgagee is entitled to Costs.

(*t*) *Parsons v. Bank of Montreal* (1868) 15 Gr. 411; *Long v. Long* (1869) 16 Gr. 239. The owner of the equity of redemption must be made a party to such an action: *ib.*

(*u*) *Rogers v. Lewis* (1866) 12 Gr. 257; *McLaren v. Fraser* (1868) 15 Gr. 239.

(*v*) *Muchall v. Banks* (1862) 10 Gr. 25; see *Little v. Hawkins* (1872) 19 Gr. 267; *Wigle v. Settrington* (1872) 19 Gr. 512; *Bell v. Walker* (1873) 20 Gr. 558; *Hilton v. Woods* (1867) L.R. 4 Eq. 432.

(*w*) *Moore v. Hobson* (1868) 14 Gr. 703; see *Rogers v. Lewis* (1866) 12 Gr. 257.

(*x*) *McLaren v. Fraser* (1868) 15 Gr. 239.

(*y*) *McDougall v. Campbell* (1881) 6 S.C.R. 502.

(*z*) *Grange v. Barber* (1868) 2 Chy. Ch. 189.

redemption only and not to sale. A subsequent incumbrancer may, however, have judgment for sale if the prior mortgagee consents thereto or does not object ; but in that case the proceeds of the sale will be applied in satisfaction of the claims of the incumbrancers according to their priorities, and the subsequent incumbrancer will not be entitled to any priority in respect of his costs even although the fund prove insufficient (a).

iv. Terms of Redemption—Tender.

A person who has a right to redeem, whether at or after maturity, will not be entitled to a reconveyance except on payment or tender of the amount due under the mortgage contract for principal and interest.

Tender stops
interest and
costs.

But the
money must
be kept
ready.

Tender must
be made by
person
entitled to
redeem.

To the
person
entitled to
receive the
money.

If a person entitled to redeem makes a proper tender of the amount due, the mortgagee will not be entitled to recover interest accruing or costs incurred thereafter (b). A proper tender stops the running of interest, but the person liable to pay must keep the money ready to pay over on demand to the mortgagee (c).

A tender to be good must be made by a person entitled to redeem ; tender by a stranger is not good, for as against a stranger the mortgagee's estate is absolute. It may be made by the solicitor or agent of the person entitled to redeem (d).

A tender may be made to the mortgagee, or to any other person entitled to receive the money and reconvey the estate, as for example, a trustee of the mortgagee, his assignee, or his executors or administrators (e).

(a) *Grange v. Barber* (1868) 2 Ch. Ch. 189.

(b) *Knapp v. Bower* (1871) 17 Gr. 695; *Bishop v. Church* (1751) 2 Ves. Sen. 370; *Lord Middleton v. Elio* (1847) 15 Sim. 531.

(c) *Kinnaird v. Trollope* (1889) 42 Ch. D. 610; *Bank of New South Wales v. O'Connor* (1889) 14 App. Cas. 273; *Knapp v. Bower* (1871) 17 Gr. 695.

(d) *Ward v. Carttar* (1865) L.R. 1 Eq. 29.

(e) *Cliff v. Wadsworth* (1843) 2 Y. & C.C.C. 598.

A tender to a solicitor or other agent of the mortgagee will not be good unless he has authority to receive the mortgage money (*f*). To agent of the mortgagor.

If a place is appointed for payment the tender must be made at that place. If the mortgagee has demanded payment or if the mortgagor is willing to pay six months' interest in lieu of notice, a tender may be made at any time. But if the money is payable at a time certain by the mortgage contract, or at the expiration of a six months' notice after default, the tender must be made on the very day (*g*). Place and time of making tender.

In order to constitute a good tender there must be actual production and offer of the money, unless waived by the mortgagee. But actual production may be dispensed with if the creditor refuses to accept the money when the debtor offers to produce it, but before he has actually produced it. But the debtor must have the money ready to pay at the time when he offers to do so (*h*). Money must be produced.

A tender made by letter without actually enclosing the money is not good (*i*). The exact amount must be tendered; a tender of a larger sum requiring change is not a good tender (*j*), and the whole amount due must be tendered; the mortgagor cannot tender a less sum and claim a set-off for the remainder (*k*). Tender by letter.

A tender to be valid must be unconditional (*l*). But Unconditional. the demanding of a receipt will not invalidate a tender otherwise good (*m*).

(*f*) *Withington v. Tate* (1869) 4 Ch. 288.

(*g*) *Briggs v. Calverley* (1800) 8 T.R. 629.

(*h*) *Lake v. Biggar* (1860) 11 U.C.C.P. 170; *Thomson v. Hamilton* (1835) 5 U.C.O.S. 111; *Milburn v. Milburn* (1847) 4 U.C.R. 179; *Pollglass v. Oliver* (1831) 2 Cr. & J. 15; *Harding v. Davies* (1825) 2 C. & P. 77; *Douglas v. Patrick* (1790) 3 T.R. 683; *Kraus v. Arnold* (1822) 7 Moo. 59; *Reynolds v. Allan* (1852) 10 U.C.R. 350; *Long v. Long* (1870) 17 Gr. 251.

(*i*) *Powney v. Bloomberg* (1844) 14 Sim. 179.

(*j*) *Cottrell v. Finney* (1874) 9 Ch. 541.

(*k*) *Searles v. Sadgrave* (1855) 5 E. & B. 639.

(*l*) *Jennings v. Major* (1837) 8 C. & P. 61.

(*m*) *Lockridge v. Lacey* (1870) 30 U.C.R. 494.

Though a conditional tender is not good, a tender of the amount claimed under protest and reserving the right of the mortgagor to dispute the amount due is valid (*n*).

A tender of mortgage money, accompanied by a statement that the person tendering did not consider that the amount tendered was due and that the other person would thereafter be compelled to repay the excess, was held not to have been invalidated by the statement (*o*). But it was held in the same case that a tender to the holder of a mortgage, who claimed a larger sum, with a condition that the mortgage, on the sum tendered being accepted, should be given up was bad as being conditional (*p*).

The mortgagee is bound to know the amount due to him and if he refuses to accept the proper amount when tendered he will do so at his own risk.

After a proper tender of the moneys due the lien of the mortgage on the property will be extinguished (*q*); although the amount due may thereafter be recovered in a personal action as a debt.

If the mortgagee refuses to accept the moneys when a proper tender is made, and to execute a discharge or reconveyance, he may be compelled to do so and may be ordered to pay the costs of an action for that purpose (*r*).

If a sale is made by the mortgagee under the power of sale in the mortgage, after a proper tender has been made, it will be set aside if the purchaser had notice of the tender (*s*).

Where the contract is made in Canada payment must be made in current money of Canada, unless otherwise provided by agreement of the parties, and a tender made

(*n*) *Sweeny v. Smith* (1869) L.R. 7 Eq. 324; *Peers v. Allen* (1872) 19 Gr. 98.

(*o*) *Peers v. Allen* (1872) 19 Gr. 98.

(*p*) *Peers v. Allen* (1872) 19 Gr. 98.

(*q*) *Martindale v. Smith* (1841) 1 Q.B. 389.

(*r*) *Harmer v. Priestley* (1853) 16 Beav. 569.

(*s*) *Jenkins v. Jones* (1860) 2 Giff. 99.

in American currency is not valid (*t*). But in the case of a mortgage payable in lawful money of the United States of America, the mortgagee is entitled only to the amount in that currency or its equivalent in Canadian currency (*u*).

Dominion notes issued by the authority of the Governor-in-Council are legal tender (*v*). Silver coins are legal tender to the amount of ten dollars, and copper or bronze coins to the amount of twenty-five cents in any one payment (*w*). The gold eagle of the United States of America is legal tender for ten dollars in Canada, and multiples and halves thereof are legal tender for proportionate sums (*x*).

No silver, copper or bronze coins are legal tender in Canada except those lawfully coined for circulation in Canada or in some Province thereof (*y*). A tender of payment in any gold, silver or copper coin which has been defaced by stamping thereon any name or word, whether lightened thereby or not, is not legal (*z*).

v. Terms of Redemption-Payment.

Payment to be valid must be made to the mortgagee or other person entitled to the money or his duly authorized agent.

Payment to one of two or more mortgagees, or to one of two or more executors of a mortgagee, is good (*a*).

If payment be made to a person not duly authorized Agent, by the mortgagee it will not be a good payment. Thus, the employment of a person to serve a notice demanding

(*t*) *Niagara Falls International Bridge Co. v. Great Western Railway Co.* (1863) 22 U.C.R. 592.

(*u*) *Crawford v. Beard* (1864) 14 U.C.C.P. 87; *Morrell v. Ward* (1863) 10 Gr. 231.

(*v*) R.S.C. (1886) c. 31, s. 4.

(*w*) R.S.C. (1886) c. 30, s. 5.

(*x*) R.S.C. (1886) c. 30, s. 7.

(*y*) R.S.C. (1886) c. 30, s. 6.

(*z*) R.S.C. (1886) c. 30, s. 9.

(*a*) *Wallace v. Kelsall* (1840) 7 M. & W. 264; *Steeds v. Steeds* (1889) 22 Q.B.D. 537; *Ewart v. Dryden* (1867) 13 Gr. 50.

Agent authorized to receive interest, not principal.

payment of the mortgage money does not give him an implied authority to receive it (*b*). And where a person has authority to receive interest on a mortgage that alone does not imply authority to receive the principal (*c*). An agent who is authorized to collect rent, and to contract for the sale of property and receive payment of the purchase money, is not thereby authorized to receive payments on a mortgage given for the unpaid purchase money (*d*).

onus of proving agency on the mortgagor.

The onus of showing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal is upon the mortgagor, and unless this onus is clearly discharged the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds (*f*).

Custody of the mortgage.

The custody of a mortgage gives no right to the custodian, whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but affects the land; and for its effectual discharge not only payment but reconveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security (*g*). But payment made to the solicitor employed by the mortgagee to bring an action to recover the mortgage money is valid and will discharge the mortgagor (*h*).

(*b*) *Toms v. Wilson* (1862) 4 B. & S. 442.

(*c*) *Palmer v. Winstanley* (1874) 23 U.C.C.P. 586.

(*d*) *Greenwood v. Commercial Bank of Canada* (1867) 14 Gr. 40.

(*f*) *In re Tracy, Scully v. Tracy* (1894) 21 Ont. App. 454; *Wilkinson v. Candlish* (1854) 5 Ex. 91; *Kent v. Thomas* (1856) 1 H. & N. 473; *Scully v. Robertson* (1894) 30 C.L.J. 472; *McMullen v. Polley* (1886) 12 Ont. 702.

(*g*) *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston* (1884) 7 Ont. 146.

(*h*) *Bourton v. Williams* (1870) 5 Ch. 655; but see *Palmer v. Winstanley* (1874) 23 U.C.C.P. 586.

Formerly an agreement to accept payment of a smaller sum, on or after the day named for payment, in discharge of a larger sum was *nudum pactum* and not enforceable (i). Accord and satisfaction.

But where there was a dispute as to the amount due; or where the money was paid before it was due; or where a chattel, cheque or promissory note, though of less value, was given and accepted in satisfaction; or where that which was given in satisfaction was more beneficial to the mortgagee, this was considered sufficient to support a defence of accord and satisfaction (j). But where a cheque was given in full of all demands but accepted only on account, it was held that the keeping of the cheque was not conclusive (k).

In Ontario, however, the rule that part performance is not a satisfaction is no longer in force. Section 58 of the *Ontario Judicature Act* (l) provides that— Rule in Ontario.

58. (8) Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

Where the day on which the money is due under the terms of the agreement falls on Sunday the payment must be made on the Saturday previous (m).

When a mortgagor pays or tenders the moneys due under the mortgage on the day when they become due according to its terms, he may stand on his strict legal rights and insist upon a reconveyance of the mortgaged property. But where he does not pay until after default and is compelled to go into a court of equity for relief, the court may impose Tacking.

(i) *Beer v. Foakes* (1883) 11 Q.B.D. 221; 9 App. Cas. 605.

(j) *Curlewis v. Clark* (1849) 3 Ex. 375; *Goddard v. O'Brien* (1882) 9 Q.B.D. 37; *Bidder v. Bridges* (1887) 37 Ch. D. 406.

(k) *Day v. McLea* (1889) 22 Q.B.D. 610; *Mason v. Johnston* (1893) 20 Ont. App. 412.

(l) R.S.O. (1897) c. 51.

(m) *Whittier v. McLennan* (1855) 13 U.C.R. 638.

terms as the price of redemption. Thus, if the mortgagee holds an execution against the mortgagor's lands, or holds a subsequent mortgage or charge against him, the mortgagor may be required to satisfy such execution, mortgage or charge as a term of being allowed to redeem.

Consolidation.

So also where a mortgagor has given to the mortgagee two or more mortgages on separate properties, and both or all are in default, the mortgagee may insist on his right of consolidation and require the mortgagor to redeem both or all, if he seeks to redeem one. The rules as to tacking and consolidation are founded on the maxim that "he who seeks equity must do equity (*n*)."

vi. Action of Redemption.

Writ of summons.

The plaintiff's claim in an action for redemption is to have an account taken of what, if anything, is due on the mortgage and to redeem the property comprised therein (*b*).

Judgment on *præcipe*.

Where the writ of summons in an action for redemption is indorsed in the manner prescribed by Ontario Rule 141 the plaintiff may obtain judgment on *præcipe* in the following cases:—(*a*) Where the defendant fails to appear; or (*b*) where by his statement of defence he admits the execution of the mortgage and other facts, if any, entitling the plaintiff to a judgment; or (*c*) where the defendant disclaims any interest in the mortgaged premises; or (*d*) where no statement of defence is delivered; or (*e*) where notice is filed and served disputing the amount of plaintiff's claim only; or (*f*) where in his appearance the defendant states that he disputes the amount of the plaintiff's claim only (*bb*).

Judgment where infants concerned.

Where in a redemption action the defendants, or some of the defendants, are infants and no defence is set up, the plaintiff, upon filing affidavits of the due execution of the

(*n*) For a fuller discussion of these principles see Chapters XX *supra* p. 307, and XXI *supra* p. 313.

(*b*) Appendix to Ont. Rules, Form 9 (f).

(*bb*) Ont. Rule 596.

mortgagee and of such other facts and circumstances as entitle him to judgment, may move for judgment in chambers upon notice to the guardian *ad litem* of the infants and the other defendants' solicitor, if any (e).

In other cases the motion for judgment will be to the court (d); and if in a redemption action, in which infants are defendants, one of the adult defendants is a lunatic or person of unsound mind not so found by inquisition, the motion for judgment must be made to the court (e).

Where the judgment is for redemption or foreclosure, or redemption or sale, such proceedings are in that case to be thereupon had, and with the same effect as in an action for foreclosure or sale, and in such case the last incumbrancer shall be treated as the owner of the equity of redemption (f).

Proceedings after judgment in redemption action.

The mortgagee, therefore, in an action brought to redeem him may bring in subsequent incumbrancers and foreclose them. But if the mortgagee brings in subsequent incumbrancers the action becomes one for foreclosure instead of for redemption, and the subsequent incumbrancers may claim a sale on the same terms on which they might claim it if parties to a foreclosure action (g).

The time allowed the plaintiff in a redemption action for redemption is usually the same as is allowed a defendant in a foreclosure action—six months. The time may however be enlarged upon a proper case being shown by the plaintiff seeking redemption. It will not be enlarged as an indulgence to the mortgagor where he is plaintiff in a redemption action (h). But where the plaintiff through a *bona fide* mistake fails to pay the mortgage money into court within the time fixed by the judgment, the time may

Enlarging time for redemption

(e) Ont. Rule 595.

(d) Ont. Rule 609.

(e) *Warnock v. Prieur* (1887) 12 P.R. 264.

(f) Ont. Rule 757.

(g) Ont. Rule 382.

(h) *Faulkner v. Bolton* (1835) 7 Sim. 319.

be enlarged (*i*). If the application to extend the time is not made until after a final order dismissing the action, that order must be first vacated (*j*).

Laches may disentitle plaintiff to redemption.

Dismissal of redemption action on payment of arrears and costs.

Effect of dismissal of action for redemption.

Where the decree in a redemption suit directed that the plaintiff might have an account if he desired it, but the plaintiff took no steps to issue the decree for over twelve years, it was held that the plaintiff had disentitled himself by his laches to take further proceedings (*k*).

An action by a mortgagee for default in payment of interest or of an instalment of the principal may before judgment be dismissed upon payment into court of the amount then due for principal, interest and costs (*l*). Ontario Rule 388 is in terms applicable only to an action against the mortgagor, but it would seem that the same relief will be afforded to the mortgagor in a redemption action brought by himself (*m*).

A final decree dismissing an action for the redemption of a legal mortgage operates as a decree for foreclosure (*n*). But the dismissal of a redemption action for want of prosecution has not the effect of a decree for foreclosure, and the mortgagor may bring another action for redemption (*o*). The dismissal of an action for the redemption of an equitable mortgage by deposit of title deeds is not equivalent to a foreclosure, because in that case the judgment of foreclosure would direct the execution of a legal mortgage and the mere dismissal of the action to redeem would not have that effect (*p*). Where a second mortgagee

(*i*) *Collinson v. Jeffery* [1896] 1 Ch. 644.

(*j*) *Collinson v. Jeffery* [1896] 1 Ch. 644.

(*k*) *Eaton v. Dorland* (1893) 15 P.R. 138; see *Re Leslie* (1893) 23 Ont. 143.

(*l*) Ont. Rule 388.

(*m*) *Moore v. Merritt* (1858) 6 Gr. 550; *Dornyn v. Fralick* (1874) 21 Gr. 191; but see *Tylee v. Hinton* (1878) 3 Ont. App. 53.

(*n*) *Cholmley v. Countess Dowager of Oxford* (1741) 2 Atk. 267; *Bishop of Winchester v. Paine* (1805) 11 Ves. 104; *Inman v. Wearing* (1850) 3 DeG. & S. 729; *Cornwall v. Henriod* (1866) 12 Gr. 338.

(*o*) *Hansard v. Hardy* (1812) 18 Ves. 455.

(*p*) *Marshall v. Shrewsbury* (1875) 10 Ch. 250.

brings action to redeem the first mortgagee and to foreclose the mortgagor, and the second mortgagee fails to redeem, the action will be dismissed as against both the first mortgagee and the mortgagor with costs (q).

If in a redemption action the plaintiff makes default in payment according to the report the defendant is entitled on an *ex parte* application in chambers to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs (r).

Foreclosure
may be
granted in
redemption
action.

Ontario Rule 392 provides that where in a redemption action the plaintiff is declared foreclosed, directions may be given either by the final order of foreclosure, or by subsequent orders, that all necessary enquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained by the original defendant. This Rule is for the convenience of the mortgagee, and where in a redemption action the plaintiff is foreclosed the mortgagee is not under obligation to take in that action the proceedings provided by the Rule, and if he does not take such proceedings he will not be deprived of the costs of a subsequent action brought by him for foreclosure (s).

Directions
where plain-
tiff in
redemption
action is
foreclosed.

(q) *Hallett v. Furze* (1885) 31 Ch. D. 312.

(r) Ont. Rule 391.

(s) *McKinnon v. Anderson* (1871) 18 Gr. 684.

CHAPTER XXVIII.

LIMITATION OF ACTIONS FOR REDEMPTION.

Mortgagor's right to redeem not barred while he remains in possession.

So long as the mortgagor remains in possession of the mortgaged lands his right to redeem cannot be barred by lapse of time; although if the mortgagor remain in possession without payment or acknowledgment of the mortgagee's claim for ten years the latter's right to foreclose will be barred (*a*). For if the mortgagee has a right to foreclose or to obtain possession, and takes proceedings, the mortgagor may redeem on payment of principal, interest and costs (*b*). Conversely, if the mortgagee obtains possession his right to foreclose will not be barred by lapse of time so long as he remains in possession. But if he retains possession without acknowledgment for ten years the mortgagor's right to redeem will be barred, and the mortgagee will then become the absolute owner (*c*).

If mortgagee in possession right of redemption barred in ten years.

Accordingly, so long as the mortgagor retains possession, his right to redeem continues until actually foreclosed; but if the mortgagee obtain possession the right to redeem may be barred by lapse of time. This is provided by section 19 of the *Real Property Limitation Act* (*d*) which is as follows:—

19. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or some person claiming his estate, or to the agent

(*a*) R.S.O. 1897. c. 133, s. 4; *Doe d. MacGregor v. Hawke* (1837) 5 U.C.O.S. 496.

(*b*) Ont. Rule 388.

(*c*) R.S.O. (1897) c. 133, s. 19.

(*d*) R.S.O. (1897) c. 133.

of such mortgagor or person, signed by the mortgagee, or the person claiming through him; and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (e).

This section is taken from the Imperial Act (f) and was first enacted in Canada by 4 Will. IV. chapter 1, section 36. Before this enactment there was no statutory provision limiting the time within which a mortgagor out of possession might redeem. The statute 21 Jac. I. chapter 16, section 1 (g), which provided that no entry should be made into any lands but within twenty years (now ten years) after the right or title to the same should accrue, was held not to apply to claims which could be asserted only in a court of equity. The mortgagor after default had no right or title that was recognized by courts of law, but only a right or equity enforceable in courts of equity (h).

Formerly there was no limit by statute in equity.

But after some conflict it was decided in courts of equity that the time within which a suit might be brought by a mortgagor should be regulated by analogy to the statute of James (i).

Courts of equity acted by analogy to courts of law.

According to the words of the statute the action must be brought within ten years from the time at which the mortgagee obtained possession; but it would seem that if the mortgagee takes possession before default the time will not begin to run as against the mortgagor before the day fixed for redemption, as the mortgagor cannot redeem before that day (j).

Time runs from possession.

It has been held that the time will run against a person entitled to the equity of redemption in remainder, although

(e) In British Columbia the corresponding enactment is R.S.B.C. (1897) c. 123, s. 40. In New Brunswick C.S.N.B (1877) c. 84, s. 25. In Manitoba R.S. Man. (1891) c. 89, s. 20.

(f) 3 and 4 Will. IV. c. 27.

(g) This was superseded in Canada by 4 Will. IV. c. 1, s. 16, now R.S.O. (1897) c. 133, s. 4.

(h) *Bonney v. Ridgard* (1784) 1 Cox 145.

(i) *Barron v. Martin* (1815) 19 Ves. 327.

(j) *Brown v. Cole* (1845) 14 Sim. 427.

the mortgagee enters into possession and the statutory period elapses in the lifetime of the tenant for life (*k*).

Mortgagor
may be
barred as to
part of the
lands.

What posses-
sion will bar
mortgagor.

Where the mortgagee has been in possession of part of the mortgaged property for the statutory period, the right of the mortgagor as to that part will be barred although he has been in possession of the remainder (*l*).

The possession required by the statute to bar the mortgagor's right must be the possession of the same person, or of several persons claiming one from or under the other, by conveyance, will or descent (*m*).

Possession of
solicitor is
possession
of his client.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees, "their heirs and assigns forever, all and singular" the mortgaged land, *habendum* "as and for all the estate and interest" of the grantors "in and to the same," this was held sufficient to pass to the grantees, the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, and the mortgagees' possession, coupled with the grantees' own subsequent possession for the necessary period, conferred on the latter an absolute title to the land by virtue of the *Real Property Limitation Act* (*n*).

Where the solicitor of a mortgagor paid off the mortgage for his own benefit but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time would not run against the client (*p*).

The statute applies not only to the mortgagor but also to all persons claiming through him, whether by conveyance, descent or devise.

(*k*) *Harrison v. Hollins* (1812) 1 S. & St. 471.

(*l*) *Kinsman v. Rouse* (1881) 17 Ch. D. 104.

(*m*) *Doe d. Carter v. Barnard* (1849) 13 Q.B. 945 at p. 152; *Bright v. McMurray* (1882) 1 Ont. 172; *Dedford v. Boulton* (1878) 25 Gr. 561.

(*n*) *Bright v. McMurray* (1882) 1 Ont. 172.

(*p*) *Ward v. Carttar* (1865) L.R. 1 Eq. 29.

If the mortgagee is in possession of the property under some title other than that of the mortgage, the period of such possession will be excluded in making up the statutory period (*q*).

Possession of mortgagee under some other title.

Where a mortgagee pays the taxes on unoccupied wild lands comprised in the mortgage for more than the statutory period, that is not sufficient to constitute possession under the statute (*r*).

Payment of taxes not possession.

In the case of vacant lands the constructive possession is in the mortgagee and the statute does not run against him so as to extinguish his title (*s*). Where actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for the statutory period (*t*).

Possession of vacant lands is in the mortgagee.

The acknowledgment must be in writing and signed by the mortgagee or a person claiming through him. There is no provision that it may be signed by an agent of the mortgagee.

Acknowledgment.

The acknowledgment required by this section differs from that mentioned in sections 13 and 23 of the statute.

The acknowledgment under section 19 of the *Real Property Limitation Act* must be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person. Formerly an assignment of the mortgage of which the mortgagor might not have any knowledge was a sufficient acknowledgment of the existence of the equity of redemption. But under this section such an acknowledgment not being given to the mortgagor will not avail (*u*).

Must be given to mortgagor or his agent.

- (*q*) *Hyde v. Dallaway* (1843) 2 Ha. 528.
- (*r*) *McDonald v. McDonell* (1864) 2 E. & A. 393.
- (*s*) *Delaney v. Canadian Pacific Railway Co.* (1891) 21 Ont. 11.
- (*t*) *Kay v. Wilson* (1877) 2 Ont. App. 133.
- (*u*) *Lucas v. Dennison* (1843) 13 Sim. 584.

If made to
one mort-
gagor it
saves the
rights of all.

If there is more than one mortgagor an acknowledgment made to one is sufficient to save the rights of all. Section 20 provides as follows:—

20. In case there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons (v).

Where some of several tenants in common are barred by the *Statute of Limitations*, and others of them are not, the latter are entitled to redeem the whole mortgaged estate, and not merely an aliquot part (w).

If given by
one of two
or more
mortgagees.

Where there are more mortgagees than one, an acknowledgment made by one is effectual only as to the mortgagee giving it, and will not bind all the mortgagees. The mortgagor in such a case will be entitled to redeem the interest of the mortgagee giving the acknowledgment on payment of his proportion of the mortgage moneys. This is provided by section 21 of the *Real Property Limitation Act* which is as follows:—

21. In case there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage (x).

(v) R.S.O. (1897) c. 133, s. 20.

(w) *Faulds v. Harper* (1882) 2 Ont. 405; 9 Ont. App. 537: 11 S.C.R. 639; see also *Martin v. Miles* (1883) 5 Ont. 404.

(x) R.S.O. (1897) c. 133, s. 21.

But where the mortgagees are jointly interested as trustees and have no beneficial interest an acknowledgment given by one is altogether inoperative (*y*).

If a mortgagee keeps an account of the rents derived from the lands and renders a signed account to the mortgagor, this will be a sufficient acknowledgment of the mortgagor's title (*z*).

A letter written by the mortgagee and sent to the mortgagor in which he states his willingness to give an account is a sufficient acknowledgment (*a*).

The admission of the mortgagor's right to redeem must be unequivocal to constitute a valid acknowledgment. Thus an admission by the mortgagee that he holds under a mortgage title is not sufficient (*b*).

In one case an acknowledgment given after the statutory period had elapsed was held sufficient to restore the mortgagor's right to redeem (*c*); but this has been doubted in a recent case and would seem open to question, for the words of the statute "in the meantime" refer, it seems, only to the period of ten years after possession taken (*d*).

Section 19 does not provide that the right of the mortgagor is to be extinguished but only that he shall not bring an action. Under section 15 it is expressly provided that the right of the person claiming the land or rent shall after the lapse of the statutory period be extinguished (*e*).

But it has been held that section 15 is applicable to mortgage cases, and has the effect, when the mortgagee is

Signed account of mortgagee in possession sufficient.

Letter stating willingness to give an account.

Admission of right must be unequivocal.

Acknowledgment given after statutory period has elapsed.

Right of action barred.

Title extinguished

(*y*) *Richardson v. Younge* (1870) 10 Eq. 295; (1871) 6 Ch. 478.

(*z*) *Baker v. Wetton* (1845) 14 Sim. 426; *Richardson v. Younge* (1870) L.R. 10 Eq. 295.

(*a*) *Richardson v. Younge* (1870) L.R. 10 Eq. 295.

(*b*) *Thompson v. Bowyer* (1863) 9 Jur. N.S. 863.

(*c*) *Stansfield v. Hobson* (1852) 16 Beav. 236; 3 DeG. M. & G. 620.

(*d*) *Markwick v. Hardingham* (1880) 15 Ch. D. 339, at p. 346.

(*e*) *Dawkins v. Lord Penrhyn* (1877) 6 Ch. D. 318; *Court v. Walsh* (1882) 1 Ont. 167.

barred by statute, of transferring the entire right and estate of the mortgagee to the mortgagor (*f*).

An acknowledgment made under section 13, after the lapse of the statutory period, has been held to be unavailing (*g*). And so possession obtained by the mortgagee after the lapse of the statutory period does not revive his title (*h*).

Disability of
mortgagor
not provided
for.

It will be observed that the sections above quoted make no provision, nor is any provision made in the act, for the disability of the mortgagor or those claiming under him; and the opinion has been expressed that in such a case no further time can be allowed for redemption (*i*).

Decisions
against
allowance for
disabilities.

In England before the passing of the Imperial Act (*j*) from which our enactment is taken, courts of equity regulated the time allowed for redemption by analogy to the old *Statute of Limitations* (*k*) and gave further time for redemption in case of any disability mentioned in that statute, namely, imprisonment, infancy, coverture, unsoundness of mind or absence beyond seas.

It has been held in England that the sections providing for disabilities in the case of actions to recover land or rent do not apply to the case of a mortgagor redeeming as an action for redemption is not an action to recover land within the meaning of the sections (*l*).

(*f*) *Heath v. Pugh* (1881) 6 Q.B.D. 345; *Court v. Walsh* (1882) 1 Ont. 167.

(*g*) *McDonald v. McIntosh* (1851) 8 U.C.R. 388; *Doe d. Perry v. Henderson* (1846) 3 U.C.R. 486.

(*h*) *Court v. Walsh* (1882) 1 Ont. 167; 9 Ont. App. 294; *Bryan v. Cowdal* (1873) 21 W.R. 693; *Sanders v. Sanders* (1881) 19 Ch. D. 373.

(*i*) Leith's *Blackstone* (1880) 2nd ed. p. 444; Lord St. Leonard's *Real Property Statutes* c. 1, s. 6, p. 45.

(*j*) 3 & 4 Will. IV. c. 27.

(*k*) 21 Jac. 1, c. 16.

(*l*) *Kinsman v. Rouse* (1881) 17 Ch. D. 104; *Forster v. Patterson* (1881) 17 Ch. D. 132; see *Famids v. Harper* (1884) 9 Ont. App. 537, at p. 550 *per Burton, J. A.* (now C.J.O.).

But the better opinion would seem to be that an action for redemption is an action for the recovery of land and that section 43 applies to an action for redemption (m).

In *Faulds v. Harper* (n) the court refused to follow the English cases of *Kinsman v. Rouse* (o) and *Forster v. Patterson* (p). In the case of *Faulds v. Harper* in the Supreme Court of Canada (q) Strong, J. (now C.J.) said:—

"I think it well however to add that if I had to choose between the decisions in *Caldwell v. Hall* and those in *Kinsman v. Rouse* and *Forster v. Patterson* I should certainly have agreed with the learned judges in the Divisional Court, for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held in *Pugh v. Heath* (r) that a foreclosure suit is an action for the recovery of land. This being so it follows *a fortiori* that a redemption suit is also an action for the recovery of land."

The *Real Property Limitation Act* (s) has no application to and places no limit of time on the redemption of mortgages of personalty other than leaseholds.

But the courts have in recent cases recognized and applied the principle, in regard to equitable claims to personalty, that where there is a remedy in equity, corresponding or analogous to a remedy at law which is subject by statute to a limit as to time, equity will act by analogy to the statute and impose a like restriction (t).

Where, however, real estate and a life insurance policy have been included in one mortgage to secure one indivisible sum, the mortgaged properties being subject to one and the same proviso for redemption, and the mortgagee has been in possession of the real estate for more than the statutory period without any acknowledgment of the

Redemption action is an action to recover land.

Limitation Act does not apply to personalty except leaseholds.

(m) *Caldwell v. Hall* (1861) 7 U.C.L.J. 42; *Faulds v. Harper* (1882) 2 Ont. 405; (1886) 11 S.C.R. 655; *Pugh v. Heath* (1882) 7 App. Cas. 235.

(n) (1882) 2 Ont. 405.

(o) (1881) 17 Ch. D. 104.

(p) (1881) 17 Ch. D. 132.

(q) (1886) 11 S.C.R. 639, at p. 655.

(r) (1882) 7 App. Cas. 235.

(s) R.S.O. (1897) c. 133.

(t) *Knox v. Gye* (1872) L.R. 5 H.L. 674; *Allard v. Skinner* (1887) 36 Ch. D. 145, at p. 186; *Beck v. Pierce* (1889) 23 Q.B.D. 316, at p. 322.

mortgagor's title, so that the mortgagor's right to redeem the real estate has become barred, his right to redeem the policy is also barred—not by analogy to the statute, but because, it having become impossible for the mortgagor to require a reconveyance of the real estate, it has become equally impossible, according to the rules regulating the administration of mortgages in a court of equity, for him to require a re-assignment of the policy, the real estate and the policy together constituting one security for the debt (*u*).

Laches.

That lapse of time which would be a statutory bar to the assertion of a claim before litigation should, as a general rule, apply by analogy to induce the court to exercise its discretion by holding its hand when the laches occurs in the prosecution of an action, whether before or after judgment.

Delay in proceeding after judgment.

In *Re Leslie* (*v*), after the usual decree for redemption had been pronounced in favour of a mortgagor, who was at the time and continued afterwards to be a lunatic residing in Scotland, no proceedings were taken under it for over twenty years. Although several communications with reference to the suit passed between the mortgagor's solicitor and his curator, the latter never intervened. For some years before, and during all the time after, the making of the decree, the mortgagee, or those claiming under him, had been in possession of the mortgaged premises: and the petitioner in this matter, claiming under the mortgagee, sought, after notifying the curator of the facts and proceedings, to quiet his title under the *Quieting Titles Act*. It was held that after the great and unexplained delay in the redemption suit the decree made therein was no obstacle to the petitioner's obtaining a certificate of title.

Right of redemption may be barred by lapse of time.

The principle on which redemption is founded is relief against forfeiture: and the equity is not to be allowed

(*u*) *Charter v. Watson* [1899] 1 Ch. 175.

(*v*) (1893) 23 Ont. 143.

where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though the statutory period has not elapsed since the right to redeem accrued (*w*).

A security created by a conveyance to a trustee for sale is within the provisions of the act, even although the conveyance is made to a third person (*x*). Conveyance
to trustee
for sale is a
mortgage.

Where the mortgagee purchases the equity of redemption at a tax sale he may resist redemption (*y*).

(*w*) *Skae v. Chapman* (1874) 21 Gr. 534; *McLellan v. Maitland* (1852) 3 Gr. 164; see also *Simpson v. Smyth* (1846) 1 E. & A. 9.

(*x*) *Locking v. Parker* (1872) 8 Ch. 30; *Sanders v. Sanders* (1881) 19 Ch. D. 373.

(*y*) *Miller v. McCuaig* (1890) 6 Man. R. 539.

CHAPTER XXIX.

DISCHARGE AND RECONVEYANCE.

Reconveyance.

Upon payment of the amount which the mortgagee is entitled to claim from the mortgagor, seeking redemption and having a right to redeem, the mortgagor is entitled to a reconveyance of the mortgaged lands to himself, or if he desires it to an assignment of the mortgage debt and a conveyance of the mortgaged property to any third person as the mortgagor may direct (*a*).

Effectuated by a
statutory
discharge.

In the case of a registered mortgage a reconveyance is usually effected by means of the statutory discharge of mortgage provided for by section 76 of the *Registry Act* (*b*). The discharge is an instrument in the form of a certificate, signed by the mortgagee or the person entitled to receive the money, stating that the mortgagor or other person has satisfied the money due on the mortgage and that the mortgage is therefore discharged. It contains no words of conveyance but by virtue of the statute it operates, when registered, as a reconveyance of the original estate of the mortgagor. Section 76 is as follows:—

76. Where a registered mortgage has been satisfied, whether such mortgage has been copied in full or not, the registrar, on receiving a certificate executed by the mortgagee or if the mortgage has been assigned, then executed by the assignee, or by such other person as may be entitled by law to receive the money and to discharge the mortgage, in the form of Schedule L to this act, or the like effect, executed in the presence of one witness, and duly proven by the oath of the subscribing witness thereto, in the same manner as herein is provided for the proof of other instruments affecting lands, shall, if the assignment or other document of title of the assignee or other person executing the discharge has been registered, register the same, and every affidavit attached thereto or endorsed thereon, at full length in its proper order, in the registry book, and shall number it in like manner as other instruments are required to be registered and num-

(*a*) *McLennan v. McLean* (1879) 27 Gr. 54; R.S.O. (1897) c. 121, s. 2.
(*b*) R.S.O. (1897) c. 136.

bered, and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor.

The object of the enactment as stated by Lord Halsbury in construing a similar statute in England "was to get rid of conveyancing formalities and to make the receipt given under the statute to operate as though it were a conveyance (c)."

A certificate of discharge of mortgage operates as a reconveyance, not upon its execution and delivery, but only upon registration (d).

So where a certificate of discharge was lost before registration it was held that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors were not sufficient to enable the court to declare the petitioner entitled to the legal estate in fee simple (e). Before registration the discharge is a mere receipt or acknowledgment of the payment of money (f); and if not under seal is not an estoppel as to the fact of payment (g).

When the discharge has been registered, it operates as a conveyance, according to the words of the section, of the original estate of the mortgagor, whatever that was, and does not give a new estate derived from the mortgagee (h).

As a mortgage in fee simple executed by a tenant in tail operates to vest the fee simple in the mortgagee it was thought that the registration of a discharge of such a mortgage would only revest an estate tail as being the original estate of the mortgagor (i). But it has been held

Purpose of
statutory
discharge.

Discharge
lost.

(c) *Hosking v. Smith* (1888) 13 App. Cas. 582, at p. 585.

(d) *Trust and Loan Company v. Gallagher* (1879) 8 P.R. 97. *In re Music Hall Block, Dumble v. McIntosh* (1884) 8 Ont. 225.

(e) *Re Moore* (1878) 8 P.R. 471.

(f) *Dilke v. Douglas* (1880) 5 Ont. App. 63, at p. 70.

(g) *Bigelow v. Staley* (1864) 14 U.C.C.P. 276.

(h) *Carter v. Grasett* (1888) 14 Ont. App. 685.

(i) *Re Dolsen* (1872) 4 Chy. Ch. 36; *Lawlor v. Lawlor* (1881) 6 Ont. App. 312.

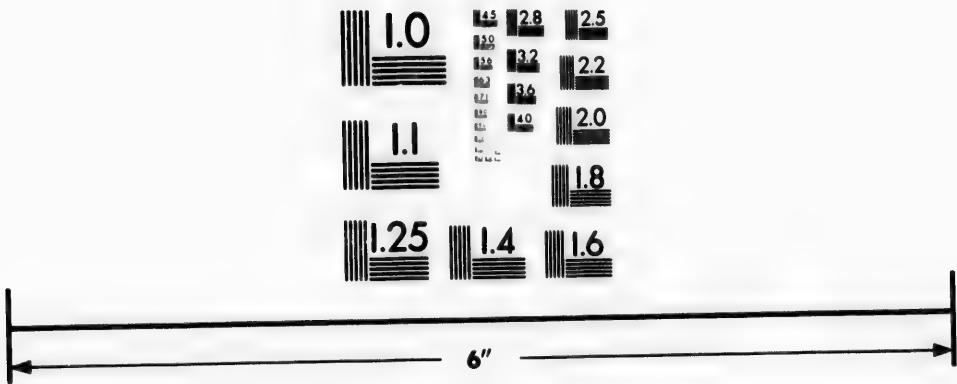
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by the Supreme Court of Canada that the discharge in such a case has the effect of reconveying the land in fee simple (*j*).

Certificate
should con-
form to the
statutory
requirements

Residence
and occupa-
tion of
witness.

Alteration of
discharge.

The certificate of discharge, being an instrument that operates as a conveyance only by virtue of the statute, should conform with reasonable strictness thereto. The act, however, provides that certain omissions and errors shall not render the certificate invalid.

Prior to the 29th day of March, 1873, it was necessary that the residence and occupation of the attesting witness to the certificate of discharge should be stated in the attestation clause (*k*). But since that date it has been unnecessary to state the residence and occupation of the witness, and certificates registered before that date are not invalid by reason of their being omitted (*l*). The affidavit of execution of a certificate of discharge of mortgage should set forth the name of the witness, his place of residence and addition, occupation or calling in full (*m*), but the registration shall not be void if they are not set forth in full, or if they are improperly or insufficiently given or described, or if there is any clerical error or omission of a merely formal or technical character (*n*).

A mortgagee executed a statutory discharge which was incorrectly dated, and his agent in good faith and in order to make the instrument conform to the intention of the mortgagee altered the date. The alteration was, under the circumstances, immaterial, and the document as altered stated correctly what was intended by the parties. The discharge was held to be valid (*o*).

(*j*) *Lawlor v. Lawlor* (1882) 10 S.C.R. 194.

(*k*) 31 Vict. (Ont.) (1868) c. 20, s. 60, Form J.

(*l*) R.S.O. (1897) c. 136, s. 84.

(*m*) R.S.O. (1897) c. 136, s. 40.

(*n*) R.S.O. (1897) c. 136, s. 44.

(*o*) *Sayles v. Brown* (1880) 28 Gr. 10.

It would appear that a certificate of discharge is inoperative to revest the lands unless the mortgage is registered (*p*).

Where the person entitled to receive the mortgage money and to discharge any registered mortgage is not the mortgagee he must register at his own expense, prior to the registration of the certificate of discharge, the instruments through which he claims title to the mortgage moneys, and until such instruments or documents are registered the registrar is not empowered to register the certificate (*q*).

In case of refusal to procure and register the instruments, the person receiving the mortgage money may be compelled by order of a judge to do so and to pay the costs of the application (*r*).

Where an instrument amounting to an equitable mortgage or charge has been registered, purporting to be a security for the payment of a debt incurred for the purchase of goods or for a loan, but not purporting to convey the lands, it may be discharged and the lands released therefrom by the registration of a similar certificate (*rr*).

If it is desired to reconvey only part of the lands comprised in the mortgage this may be effected by the registration of a similar certificate of discharge under section 82 of the *Registry Act* which is as follows:—

82. In case the mortgagee or any assignee of the mortgagee desires to release or discharge part only of the lands contained in the mortgage, or to release or discharge only part of the money specified in the mortgage, he may do so by deed or by a certificate to be made, executed, proven, and registered in the same manner as in cases where the whole lands and mortgage are wholly released and discharged; and such deed or certificate shall contain as precise a description of the portion of lands so released or discharged as would be necessary to be contained in an instrument of conveyance for registration under this act, and also a precise statement of the amount or particular sum or sums to be released or discharged.

Mortgage
and assign-
ment, if any,
must be
registered.

Person
receiving
mortgage
money must
register
instruments
through
which he
claims title.

Discharge of
lien or
charge.

Partial
discharge.

Must contain
description
of lands and
amount
released.

- (*p*) R.S.O. (1897) c. 136, s. 76.
- (*q*) R.S.O. (1897) c. 136, s. 78.
- (*r*) R.S.O. (1897) c. 136, s. 79.
- (*rr*) R.S.O. (1897) c. 136, s. 85, Schedule N.

A mortgagor or other person entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a reconveyance of the mortgaged premises, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute (s).

The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the purchaser as the person paying, or to execute a reconveyance in his favour, although the purchaser offered to furnish satisfactory proof, if desired, that he was the owner of the equity of redemption. The court, on a bill filed for that purpose, ordered the mortgagee to execute the reconveyance, and pay the costs of the suit (t).

Mortgagor in possession after payment of mortgage.

In whom discharge vests the estate.

A mortgagor in possession who has paid off the mortgage debt, but has not received a reconveyance or discharge, becomes a tenant at will to the mortgagee, and he will acquire the legal estate by adverse possession in eleven years from the date of payment (u).

When the transaction is a simple one between the mortgagor and mortgagee the legal estate revests in the mortgagor on registration of the discharge. But where the facts are more complicated, as for example where the mortgagor has mortgaged or sold his equity of redemption, or where the mortgagor has died, the question may arise whose name should be inserted in the certificate of discharge as the person who has satisfied the mortgage. And the question also may arise whether the estate revests in such person or in another person.

(s) *McLennan v. McLean* (1879) 27 Gr. 54.

(t) *McLennan v. McLean* (1879) 27 Gr. 54.

(u) *Sands to Thompson* (1883) 22 Ch. D. 614.

The result of the decisions appears to be that it is immaterial whether the name of the mortgagor, or of the person satisfying the mortgage, is inserted in the certificate, or whether the name is altogether omitted (v). Upon registration of the discharge the estate will vest, not necessarily in the person whose name is inserted in the certificate, or in the person paying off the mortgage, but in the person who is entitled to the legal estate or who has the best right to call for it (w).

Vests in the person best entitled to the legal estate.

The statute provides that the registered discharge shall be valid "as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them" (x).

Thus in *Carrick v. Smith* (y) the mortgagor in his lifetime paid part of the mortgage moneys, and after his death his widow paid the remainder on behalf of his estate. The discharge recited that the mortgagor had satisfied the moneys due on the mortgage. It was held that the estate vested in the heirs-at-law, and that the misrecital was of no consequence.

In *Fisher v. Spohn* (z) the mortgagor conveyed away his equity of redemption, and the mortgage was afterwards discharged. It was held that the estate vested in the assignee of the equity of redemption.

Where a mortgagor conveyed the equity of redemption subject to a mortgage, a discharge of which was registered on the same day as the deed, it was held that the deed must be assumed to have been delivered before it was

(v) *McLennan v. McLean* (1879) 27 Gr. 54; *Carrick v. Smith* (1874) 35 U.C.R. 348.

(w) *Carrick v. Smith* (1874) 35 U.C.R. 348; *Brown v. McLean* (1889) 18 Ont. 533; *Pease v. Jackson* (1868) 3 Ch. 576; *Hosking v. Smith* (1882) 13 App. Cas. 582; *Robinson v. Trevor* (1883) 12 Q.B.D. 423; *Fourth City Mutual Benefit Building Society v. Williams* (1879) 14 Ch. D. 140.

(x) R.S.O. (1897) c. 136, s. 76.

(y) (1874) 35 U.C.R. 348.

(z) (1883) 4 C.L.T. 446.

Purchaser of equity of redemption.

Assignee of mortgagor.

registered, and the discharge of the mortgage on registration operated as a reconveyance to the assignee of the mortgagor within the meaning of the act (*a*).

Where the mortgagee has lost the mortgage deed, he is bound at his own expense to furnish the mortgagor, or any incumbrancer redeeming him, with proof of the loss, and with an indemnity against any demand by third persons (*b*).

Lost
mortgage
deed.

Where a mortgage is paid off, the mortgagee is bound to reconvey the property so that it will vest in the mortgagors. If he should reconvey to one of several mortgagors, he will be liable at the suit of the other mortgagors for any loss they may sustain thereby (*c*).

New
mortgagee.

And when a mortgagee advances money to pay off an existing mortgage a discharge of the latter will vest the estate in the new mortgagee as being the person best entitled to call for the legal estate (*d*).

Second
mortgagee.

But where a stranger advanced moneys to pay off the first of two mortgages the estate was held to vest, after payment of the first mortgage, in the second mortgagee (*e*).

Discharge of
mortgage
paid off
by new
loan must be
registered.

If a mortgage has been paid off by a loan from a new mortgagee the discharge of the old mortgage cannot be held by the new mortgagee but must be registered within six months from its date, unless the mortgagor authorizes the new mortgagee to retain it. This is provided by section 77 of the *Registry Act* (*f*) which is as follows:—

77. In any case where a mortgage shall hereafter be paid off by any person advancing money by way of a new loan on mortgage on the same property and the mortgage so paid off or the discharge thereof is held by the mortgagee making the new loan or advance, the discharge of the mortgage so paid off shall be registered within six

(*a*) *Imperial Bank of Canada v. Metcalfe* (1886) 11 Ont. 467.

(*b*) *McDonald v. Hime* (1868) 15 Gr. 72.

(*c*) *Magnus v. Queensland National Bank* (1888) 37 Ch. D. 466.

(*d*) *Brown v. McLean* (1889) 18 Ont. 533; *Pease v. Jackson* (1868) 3 Ch. 576; *Sangster v. Cochrane* (1884) 28 Ch. D. 298.

(*e*) *Prosser v. Rice* (1859) 28 Beav. 68.

(*f*) R.S.O. (1897) c. 136.

months from the date thereof, unless the mortgagor shall, in writing, have authorized the retention of the said discharge for a longer period. Such registration shall not effect the right (if any) of any mortgagee or purchaser who may have paid off such mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid.

Where a mortgagee creates a sub-mortgage by assignment of his mortgage, it is doubtful whether the derivative mortgagee can give a valid discharge of the mortgage. It would seem advisable to re-assign the mortgage to the original mortgagee and take a discharge from him.

Where a reconveyance is effected under section 76 of the *Registry Act* (g) the certificate of discharge must be signed by the mortgagee or his assignee or by such other person as may be entitled by law to receive the money and to discharge the mortgage.

A mortgagee, or his assignee, in whom the legal estate is vested, may reconvey the lands by deed.

An agent of the mortgagee empowered to receive the mortgage money and give a discharge therefor may sign a certificate of discharge so as to revest the lands, although he cannot, apart from the statute, reconvey the lands, not being invested with the legal estate (h).

In *Lee v. Morrow* (i) a discharge of mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power, upon payment of all or any debts, to give proper and sufficient acquittances and discharges for the same; and it was held that the attorney had sufficient authority to sign the statutory certificate.

Formerly in case of the death of the mortgagee during the currency of the mortgage there was some inconvenience with regard to the reconveyance. On the death of the mortgagee his executor or administrator became entitled to the moneys secured by the mortgage as personalty (j),

Discharge
of sub-
mortgage.

Who may
reconvey.

Agent of
mortgagee.

Formerly
estate of
mortgagee
devolved
upon heir.

(g) R.S.O. (1897) c. 136.

(h) *Lee v. Morrow* (1866) 25 U.C.R. 604.

(i) (1866) 25 U.C.R. 604.

(j) *Thornborough v. Baker* (1675) 1 Ch. Ca. 283; 18 R.C. 231.

and the mortgaged lands, unless disposed of by the mortgagee, devolved upon the heir-at-law. In such a case the heir became trustee of the lands for the person entitled to the money and was the proper person to reconvey to the mortgagor on payment of the debt.

Executor or
administrator of mort-
gagee may
now convey
estate in the
land.

This inconvenience was remedied by section 11 of the *Act respecting Mortgages of Real Estate* (k), whereby the executor or administrator of a deceased mortgagee is empowered, on payment to him of the money due on the mortgage, to convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land. The section is as follows:—

11. Where a person entitled to any freehold land by way of mortgage has departed this life, and his executor or administrator has become entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the mortgage, or on receipt of the consideration money for the assignment, may convey, assign, release or discharge the mortgage debt and the mortgagee's estate in the land; and such executor or administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the estate, or any part of the mortgage lands, without payment of money; and such conveyance, assignment, release or discharge shall be as effectual as if the same had been made by the person having the mortgagee's estate (kk).

Survivor of
two or more
mortgagees.

Where there are two or more mortgagees entitled to the mortgage moneys on a joint account the survivors or the last survivor, or the personal representatives of the last survivor, may by receipt in writing give a complete discharge for the moneys due. This is provided for by sub-section 1 of section 13 of the *Act respecting Mortgages of Real Estate* (l) which is as follows:—

13. (1) Where in a mortgage or an obligation for payment of money, or a transfer of mortgage or of such obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money,

(k) R.S.O. (1897) c. 121.

(kk) In Manitoba a similar provision is made by R.S.Man. (1891) c. 146, s. 13. In Nova Scotia see R.S.N.S. (1884) c. 84, s. 20 and Statutes of 1885 48 Vict. c. 32.

(l) R.S.O. (1897) c. 121.

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belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares—the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the player of a severance of the joint account.

This section applies only to a mortgage, obligation or transfer made after the 1st day of July, 1886, and only if and as far as a contrary intention is not expressed in the mortgage, obligation or transfer, and shall have effect subject to the terms of the mortgage, obligation or transfer and to the provisions therein contained (*m*).

The expression "legal personal representatives" or "personal representatives" means executors or administrators in their official capacity, unless a different meaning is given by the context (*n*). "Personal
representa-
tives."

This section should be read in connection with section 76 of the *Registry Act* (*o*), above quoted, which provides that a certificate of discharge executed by a person entitled to receive the money and to discharge the mortgage shall operate as a reconveyance. The effect of these two enactments is to give the surviving mortgagees or assignees, or the last survivor of them, or the personal representatives of the last survivor, power to discharge the mortgage and to reconvey the legal estate (*p*).

Formerly when a mortgage was made to two or more mortgagees they took as tenants in common, and there was consequently no right of survivorship. Payment to a surviving mortgagee did not protect the person making payment against misapplication of the money, and this is so still in cases not provided for by the section. It will

(*m*) Sub-ss. 2, 3.

(*n*) *Stockdale v. Nicholson* (1867) L.R. 4 Eq. 359.

(*o*) R.S.O. (1897) c. 136.

(*p*) *Dilke v. Douglas* (1880) 5 Ont. App. 63.

be observed that there is nothing in this enactment that interferes with the general rule requiring payment to trustees to be made to all jointly or on their joint receipt.

Actual receipt of the money.

The power of the survivor of several mortgagees, or of the executors or administrators of the survivor, to execute a valid discharge, depends on the actual receipt of the mortgage money. Thus where the survivor of three mortgagees executed a discharge of the mortgage, taking in payment instead of money a mortgage on other lands, the discharge was held to be inoperative to extinguish the interest of the deceased mortgagees in favour of purchasers from the mortgagor with notice (*q*).

Application of the money if payable to a trustee.

Formerly, where mortgage moneys were payable to a trustee, the mortgagor or other person paying the money was bound to see to the application of the money, if the trust was of such a nature that he could be reasonably expected to do so. The mortgagor is now relieved from this necessity by section 14 of the *Act respecting Mortgages of Real Estate* (*r*) which is as follows:—

14. The *bona fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary is expressly declared by the instrument creating the security.

Discharge by mortgagees.

A valid discharge of a mortgage cannot be given by two of three mortgagees or trustees or any number less than all who are living (*s*).

Section 12 of the *Act respecting Mortgages of Real Estate* (*t*) provides as follows:—

12. Every certificate of payment or discharge of a mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs,

(*q*) *Dilke v. Douglas* (1880) 5 Ont. App. 63.

(*r*) R.S.O. (1897) c. 121.

(*s*) *Ewart v. Snyder* (1867) 13 Gr. 55.

(*t*) R.S.O. (1897) c. 121.

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executors, administrators, or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with the *Registry Act*, be valid to all intents and purposes whatsoever.

Under this section it was held that a discharge Discharge by executed by two of three executors was valid to release a mortgage made to the testator (*u*). This decision probably rests on the ground that one of several executors can receive and discharge debts due to the estate.

But where a mortgagor, who was one of the mortgagee's executors, executed a discharge of the mortgage made by himself to the testator its validity was questioned (*v*). And where one executor gave a mortgage to his co-executor to secure a debt due by him to the estate, and after the death of his co-executor executed a discharge of his own mortgage, it was held to be ineffectual (*w*).

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him and a release by the heirs are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the *Quieting Titles Act* (*x*).

A mortgage made to a married woman may now be discharged effectually by the execution of a certificate of discharge by herself alone, without joining her husband. This is provided by sections 80 and 81 of the *Registry Act* (*y*) which also saves the validity of registered discharges heretofore executed. The sections are as follows:—

80. It shall not be necessary to the validity of any certificate of discharge of mortgage given by a married woman that the husband of such married woman should be a party to or should execute the same; and it is hereby declared that any discharge of mortgage heretofore executed by a married woman alone, and duly registered, shall be as effectual to discharge such mortgage and to reconvey all the estate of such married woman in the mortgaged lands as if the same had been executed by the husband and wife conjointly.

(*u*) *Ex parte Johnson* (1875) 6 P.R. 225.
 (*v*) *McPhadden v. Bacon* (1867) 13 Gr. 591.
 (*w*) *Beatty v. Shaw* (1886) 13 Ont. 21; 14 Ont. App. 600.
 (*x*) *In re Thorpe* (1868) 15 Gr. 76.
 (*y*) R.S.O. (1897) c. 136.

Executor
discharging
his own
mortgage.

Foreign
administra-
tor.

81. (1) All certificates of discharge of mortgage and the registration thereof, where such certificates were executed by married women or registered previously to the 19th day of December, 1868, according to the terms of the Act passed in the 32nd year of Her Majesty's reign, and chaptered nine, shall be as valid and binding as if done after the said date.

(2) Any such certificate given between the 19th day of December, 1868, and the 29th day of March, 1873, shall be deemed to have been sufficiently executed if it has been executed jointly by such married woman and her husband; and execution on and after the 29th day of March, 1873, either jointly by the married woman and her husband, or by the married woman alone shall be deemed sufficient execution; and it shall not be necessary to produce any certificate of such married woman having been examined before any of the persons authorized by the laws in force between said dates touching her consent thereto in any wise, but nothing in this section contained shall be construed to limit the effect of the preceding section.

Sheriff.

Where a mortgage is seized under a writ of execution against the mortgagee, the sheriff or bailiff may execute a valid discharge of the mortgage upon payment to him of the money secured thereby. Section 83 of the *Registry Act* (z) is as follows:—

83. (1) When a sheriff, bailiff of a Division Court or other officer, under a writ or warrant of execution against goods, seizes any mortgage belonging to the person against whose effects the writ or warrant has issued, on or affecting land in the Province of Ontario, the payment with or without suit in whole or in part to the sheriff, bailiff or other officer by the mortgagor or any other person of the mortgage money thereby secured shall discharge the mortgage to the extent of such payment.

(2) After payment of the mortgage or any part thereof, the sheriff, bailiff, or other officer shall, at the request and expense of the person requiring the same, give a certificate in the form or to the effect of Schedule M. to this act, under the hand and seal of office of the sheriff or other officer; or under the hand of the bailiff, and the seal of the court of which he is bailiff.

(3) Upon the written request of the bailiff the clerk of the court shall affix to the certificate the seal of the court; and he shall file the request of the bailiff in his office.

(4) The execution of the certificate shall be proved by the same oath or affirmation, and in the same manner as is provided by law for the proof or registration of other instruments affecting lands, and the certificate shall be registered in the same manner as other certificates of discharge of mortgages are registered.

(5) Every certificate so registered, if the same is of payment in full of the mortgage, shall be as valid and effectual in law as a release of the mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor as if executed by the execution debtor.

(z) R.S.O. (1897) c. 136.

(6) Every certificate so registered, if the same is of payment of only a portion of the mortgage, shall be as valid and effectual in law as a release of the mortgage as to such portion, as if executed by the execution debtor.

(7) The provisions of this section shall extend and apply to all cases in which the seizure or payment was before, or since the 21st day of December, 1874.

Right to assignment instead of reconveyance.

CHAPTER XXX.

RIGHT OF MORTGAGOR TO ASSIGNMENT OF THE MORTGAGE.

A mortgagor may under certain circumstances require an assignment of the mortgage security to be made to a third person named by himself. Section 2 of the *Act respecting Mortgages of Real Estate* (*a*) is as follows:—

2. (1) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment on reconveying, on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to assign and convey accordingly.

(2) The right of the mortgagor under this section to require an assignment as aforesaid shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

(3) This section does not apply in the case of a mortgagee being or having been in possession.

(4) This section shall have effect notwithstanding any stipulation to the contrary (*b*).

This section requires the mortgagee to make an assignment on the terms on which he would be bound to reconvey. These words refer to the general terms subject to which a mortgagor may redeem, such as payment of the amount due under the mortgage and of the amount, if any, to which the mortgagee may be entitled by virtue of a right to tack or consolidate.

But the mortgagor cannot by an assignment get a higher or better title to the estate than that to which he would be entitled under a reconveyance. The assignment

(*a*) R.S.O. (1897) c. 121.

(*b*) This enactment is based on the Imperial Act 44 & 45 Vict. (1881) c. 41, s. 15.

must be subject to the rights of other persons interested in the equity of redemption. Thus, where lands are mortgaged and then settled on the mortgagor as tenant for life with remainders over, the mortgagor, on redeeming, is entitled to call for an assignment to a third person only upon the terms that the assignment shall be subject to the rights of those interested under the settlement (c).

The meaning of the corresponding English enactment *Teevan v. Smith*.
was fully discussed in *Teevan v. Smith* (d) by Jessell, M.R.,
who in delivering judgment said:—

"It says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute; but where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage, he must also redeem all those who are between that mortgagee and himself. . . . So that the words 'where a mortgagor is entitled to redeem' really includes every mortgagee, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem' are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says, 'he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things: first, that the mortgagee is bound to reconvey to the person applying to him, and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act. He is an assign of the mortgagor and is entitled to redeem. . . . Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgagees of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee to assign the mortgage? It must be that one who is next to him. The first incumbrancer has the first right to redeem, and it is impossible to suppose that it was intended that a puisne mortgagee was to have the right to call for a transfer of the first mortgage, before one who is prior to himself."

(c) *Alderson v. Elgey* (1884) 26 Ch. D. 567.

(d) (1882) 20 Ch. D. 724.

Mortgagee
in possession
not bound
to assign.

Who are
included
under
"mortga-
gor" and
"mortga-
gee."

Consent of
intermediate
incumbran-
cers.

A mortgagee in possession is not bound to give an assignment of the mortgage; but he may be required to give a reconveyance (e).

Under section 1 of the *Act respecting Mortgages of Real Estate* "mortgagor" includes "any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged property;" and "mortgagee" includes "any person from time to time deriving title under the original mortgagee."

Where there are two or more mortgages made by the same mortgagor on the same property the mortgagor cannot require the first mortgage to be assigned to a third person without the consent of the subsequent mortgagee (f). In *Rogers v. Wilson* (g) the defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought action, asking for sale, payment and possession. After service of the writ of summons the amount due and costs were tendered by the defendant, and an assignment of the first mortgage to a third person was also tendered for execution by the plaintiff. The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge; and the defendant moved for a *mandamus* to compel him to execute an assignment. It was held that the plaintiff was justified in refusing to execute the assignment.

Where both the mortgagor and the subsequent incumbrancer pay the money due to the plaintiff into the bank, the subsequent incumbrancer has the right to a conveyance in preference to the mortgagor, and as between two

(e) *Stark v. Reid* (1895) 26 Ont. 257; R.S.O. (1897) c. 121, s. 2.

(f) *Teevan v. Smith* (1882) 20 Ch. D. 724; *Rogers v. Wilson* (1887) 12 P.R. 322.

(g) (1887) 12 P.R. 322.

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incumbrancers the one who is prior is entitled to the conveyance (*h*).

But where the mortgagor has assigned his equity of redemption, he is entitled, if called on to pay the mortgage money, to an assignment; and this, although the mortgagee holds a subsequent mortgage from the purchaser of the equity of redemption (*i*); and he is entitled as against the purchaser of the equity of redemption to a charge on the land for the amount so paid by him (*j*).

So where the mortgagor of certain lands sold them for a sum in excess of the amount of his mortgage, the purchaser raising such excess by a mortgage to the original mortgagee, the mortgagor was held entitled to an assignment of the mortgage made by him on his paying the original mortgagee merely the amount due thereon, and without paying off the second mortgage (*k*).

In such a case the holder of the second mortgage would be entitled to demand a re-assignment of the first mortgage, but he could not insist on an assignment of the mortgagor's covenant to pay the mortgage debt (*l*).

In *Stark v. Reid* (*m*) the mortgagees in possession of certain lands afterwards acquired by transfer a second mortgage on the same property, and then brought action on the covenant in the first mortgage against the original mortgagors, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage, subject to equities of redemption existing in

Mortgagor's right to assignment after parting with equity of redemp-tion.

(*h*) *Teevan v. Smith* (1882) 20 Ch. D. 724.

(*i*) *Stark v. Reid* (1895) 26 Ont. 257; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636; *Wheeler v. Brooke* (1894) 26 Ont. 96; *Queen's College v. Claxton* (1894) 25 Ont. 282.

(*j*) *Hamilton Provident Loan and Investment Society v. Smith* (1888) 17 Ont. 1.

(*k*) *Wheeler v. Brooke* (1894) 26 Ont. 96.

(*l*) *Wheeler v. Brooke* (1894) 26 Ont. 96; see also *Gooderham v. Traders Bank* (1888) 16 Ont. 438.

(*m*) (1895) 26 Ont. 257.

Right to reconveyance.

other parties. It was held that the original mortgagors were entitled to this, and that the mortgagees could not tack the amount of the second mortgage to the first and require payment of both (*n*).

Assignment
to nominee
of
mortgagor.

In *Queen's College v. Claxton* (*o*) a mortgagor of land conveyed his equity of redemption to several grantees, one of whom agreed to pay off the mortgage, and some of whom also executed further mortgages upon the land. The first mortgagee proceeded to foreclose and to sue the mortgagor upon his covenant, whereupon the latter requested the first mortgagee to assign his mortgage to a third person who had advanced the money and paid off the mortgage. It was held that the first mortgagee was bound to execute the assignment as asked, notwithstanding the subsequent incumbrances (*oo*). And even if the redemption money had been that of the mortgagor himself, it would have made no difference (*p*).

Person
liable to pay
mortgage
not entitled
to assign-
ment without
paying other
mortgages.

Where, however, there are two mortgages, upon both of which the person requiring an assignment of one is primarily liable as between himself and the other persons interested in the equity of redemption, he will not be entitled to an assignment without paying off the other mortgage. Thus in *Thompson v. Warwick* (*q*) mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. The purchaser then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage. It was held that the sub-purchaser, when called upon by

(*n*) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636, followed.

(*o*) (1894) 25 Ont. 282.

(*oo*) *Teeran v. Smith* (1882) 20 Ch. D. 724, distinguished; *Kinnaird v. Trollope* (1888) 39 Ch. D. 636, followed.

(*p*) *Queen's College v. Claxton* (1894) 25 Ont. 282, *per Boyd, C.*

(*q*) (1894) 21 Ont. App. 637.

the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof, without also paying the second mortgage.

In *Muttlebury v. Taylor* (r) the owner of property mortgaged it, and then sold subject to the mortgage, taking from the purchaser as part of his purchase money a second mortgage, which he assigned to the first mortgagee. The purchaser then sold to a sub-purchaser who, to obtain an extension of time on the first mortgage, entered into a covenant with the mortgagee to pay it, and afterwards sold the property. In a foreclosure action the mortgagee claimed an order for the payment of the first mortgage by the sub-purchaser under his covenant, and the latter refused to pay the amount due on it unless the mortgagee would assign the mortgage to him. It was held that the mortgagee was not bound to assign unless the sub-purchaser paid off both mortgages.

Where there are other persons interested in the equity of redemption besides the person redeeming, the conveyance should be made subject to the rights of all parties interested (s).

The mortgagor or other person redeeming is not entitled to any covenant from the mortgagee except the usual covenant against incumbrances (t).

Before this act a person redeeming a mortgage was entitled to a reconveyance of the lands, but not to an assignment of the mortgage debt (u).

Assignment
should be
subject to
equities of
other persons

Mortgagor
redeeming
entitled only
to covenant
against
incumbran-
ces.

(r) (1892) 22 Ont. 312.

(s) *Kinnaird v. Trollope* (1888) 39 Ch. D. 636; *Gooderham v. Traders Bank* (1888) 16 Ont. 438; *Stark v. Reid* (1895) 26 Ont. 257.

(t) *Gooderham v. Traders Bank* (1888) 16 Ont. 438.

(u) *Gooderham v. Traders Bank* (1888) 16 Ont. 438.

CHAPTER XXXI.

RIGHT OF MORTGAGOR TO INDEMNITY.

Mortgagor
selling
entitled to
indemnity.

Reason for
this rule.

A mortgagor selling his equity of redemption is entitled in the absence of any stipulation to the contrary to be indemnified by his vendee against the mortgage (a).

The principle of the rule was thus stated by Lord Eldon in *Waring v. Ward* (b):—

"If he (the purchaser) enters into no obligation with the party from whom he purchases, neither by bond or covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

In *Jones v. Kearney* (c) Sir Edward Sugden laid down the doctrine of the court in these words:—

"Now, what was the situation in which ~~Kearney~~, the defendant, stood? He became the assignee of the plaintiff under the deed of the 24th of September, 1834. He was in the ordinary position of a purchaser buying an estate *cum onere*. The plaintiff were subject to a burden: the purchaser did not enter into any particular obligation to discharge that burden, or to indemnify the seller; it was not necessary that he should do so. This court fastens on every such purchaser a liability to indemnify the seller against the incumbrances affecting the property sold. If I create an incumbrance on my estate, and sell, and no engagement be entered into with respect to that incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance. It was my object, in so selling, to charge him and indemnify myself. This is a proposition which is perfectly clear, requiring no authority to support it."

(a) *Thompson v. Wilkes* (1856) 5 Gr. 594; *Waring v. Ward* (1802) 7 Ves. 332; *Canavan v. Meek* (1883) 2 Ont. 636; *Boyd v. Johnston* (1890) 19 Ont. 598; *Jones v. Kearney* (1841) 1 Dr. & War. 134; *Bridgman v. Davy* (1892) 40 W. R. 253.

(b) 7 Ves. (1802) 332, at p. 336.

(c) (1841) 1 Dr. & War. 134, at p. 155.

In *Walker v. Dickson* (d) the law was stated by Burton J.A. (now C.J.O.) thus:—

"It is familiar law, scarcely at this day requiring a reference to authorities, that where a person purchases an estate which is subject to a mortgage, meaning at the time of the contract to buy the estate subject to that incumbrance, he is liable in equity to indemnify his vendor against the incumbrance."

When, however, a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation in the conveyance as to payment of the incumbrance, the right to indemnity against the incumbrance does not arise from anything contained in the mortgage or conveyance, but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract (e).

This equitable doctrine of the right to indemnity applies only as against a purchaser in fact, and, therefore, where at the request of the actual purchaser the land in question was conveyed to his nominee by deed, absolute in form, but for the purpose of security only, the nominee was held not liable to indemnify the vendor (f).

In *Fraser v. Fairbanks* (g) a mortgagor agreed in writing to sell lands, subject to mortgages thereon, to a purchaser in trust for himself and others, who it was understood were to form a company to take over the property. Before the transaction was completed the company was incorporated, and the purchaser filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against the mortgagor to recover interest due on a mortgage against the property, the purchaser was brought in as a third party to indemnify the mortgagor against a judgment in the action. It was held,

(d) (1892) 20 Ont. App. 96, at p. 102.

(e) *Beatty v. Fitzsimmons* (1893) 23 Ont. 245; *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664.

(f) *Walker v. Dickson* (1892) 20 Ont. App. 96.

(g) (1894) 23 S.C.R. 79.

reversing the decision of the Supreme Court of Nova Scotia, that the evidence showed that the sale was not to the purchaser on his own behalf, but for the company, and the company and not the purchaser was liable to indemnify the vendor.

Mortgagor
may call on
purchaser
to pay the
mortgage.

When a mortgagor, who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to the mortgage, a relation of suretyship arises between him and the purchaser as to the payment of the debt, and if the debt is allowed to run into default the mortgagor will be entitled to call upon the assignee to pay it (*h*).

And may
bring his
action before
he has paid
anything.

If the purchaser of the equity of redemption covenants to indemnify the mortgagor the latter may maintain an action against such purchaser before he has been compelled to pay anything (*i*).

Several
purchasers
of equity of
redemption.

Where a purchaser of part of an estate, subject to mortgage, gave a covenant to pay a proportion of the mortgage money, and a bill was filed by the vendor's assignee to compel payment by the purchaser, the court refused to give such relief, except upon the term of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant by the vendor that he would pay. But the court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceedings against such defaulting purchasers upon indemnifying him against costs (*j*).

(*h*) *Campbell v. Robinson* (1880) 27 Gr. 634.

(*i*) *Cullin v. Rinn* (1887) 5 Man. R. 8; *Higgins v. Trusts Corporation of Ontario* (1899) 30 Ont. 684; *Mewburn v. Mackelcan* (1892) 19 Ont. App. 729.

(*j*) *Clemow v. Booth* (1879) 27 Gr. 15.

And if a mortgagor who has conveyed his equity of redemption, subject to the mortgage, is called on for payment by the mortgagee under the covenant for payment, the mortgagor is entitled as against the purchaser of the equity of redemption to a lien on the lands for the amount which he is compelled to pay (*k*).

Where the equity of redemption has been sold under a writ of execution against lands the mortgagor, if compelled to pay the mortgage debt, may maintain an action therefor against the purchaser, and shall have a lien on the lands for the amount he has been compelled to pay. This is provided by section 32 of the *Execution Act* (*l*) which is as follows:—

32. A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place has issued), may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser; but in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee entitles payment of the mortgage debt against the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged lands.

A claim against a purchaser of an equity of redemption for indemnity against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter (*m*).

So where a mortgagor sells his equity of redemption in mortgaged lands and takes a covenant for payment of the mortgage debt from his grantee, who in turns sells and takes a like covenant for payment, which he assigns to the mortgagor, the latter may maintain an action thereon against the last purchaser (*n*).

Mortgagor
is entitled
to a lien on
lands for
what he
pays.

Sale of
equity under
execution.

Claim to
indemnity
may be
assigned
to the
mortgagee.

(*k*) *Hamilton Provident Loan and Investment Co. v. Smith* (1888) 17 Ont. 1.

(*l*) R.S.O. 1887, c. 77.

(*m*) *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664.

(*n*) *Small v. Thompson* (1897) 28 S.C.R. 219.

**Married
woman's
liability to
indemnity.**

In Manitoba a covenant on the part of the purchaser to pay the mortgage moneys and indemnify the mortgagor is implied, unless otherwise expressed, in every instrument transferring land subject to a mortgage (*o*).

A married woman who purchases an equity of redemption is not bound to indemnify her grantor unless she expressly contracts to do so (*p*).

(*o*) R.S. Man. (1891) c. 133, s. 81. A similar provision is in force in the North-West Territories, 57 & 58 Vict. (D.) (1884) c. 28, s. 65.

(*p*) *McMichael v. Wilkie* (1891) 18 Ont. App. 464.

CHAPTER XXXII.

RIGHT OF MORTGAGOR TO AN ACCOUNT.

In an action for foreclosure, sale or redemption, the judgment usually provides that an account be taken of the amount due on the mortgage, whether the mortgagee has been in possession or not (a).

Where the action is for redemption the writ should be indorsed for an account as follows:—

"The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated — and made between (*parties*) and to redeem the property comprised therein" (aa).

If the mortgagee has sold the mortgaged property under his power of sale, whether he has been in possession or not, the mortgagor may bring an action for an account and to recover the surplus in the hands of the mortgagee (b).

In such a case the mortgagor should before action make a demand for an account, otherwise he may be disallowed his costs, especially if he makes charges which he fails to substantiate (c).

Such an action may be brought in the County Court if the balance claimed is within the jurisdiction (d).

In an action on the covenant for payment the officer signing judgment in default of appearance computes the amount due. If the defendant enters an appearance but disputes only the amount claimed, he may serve a notice to that effect; and the plaintiff thereupon may proceed to take an account of the amount due before the officer

Mortgage actions account directed.

Indorsement of writ for an account.

After sale mortgagor may bring action for an account.

County Court.

Action on the covenant: account taken by officer signing judgment.

(a) See Holmested & Langton's Judicature Act, 2nd ed. 259, 739; Ont. Rules 141, 595, 596; Appendix to Ont. Rules, Forms 153, 154, 155.

(aa) Ont. Rule 140; Appendix to Ont. Rules, Form 9 (f).

(b) *Beatty v. O'Connor* (1884) 5 Ont. 731, 747; *Reddick v. Traders Bank of Canada* (1892) 22 Ont. 449; Ont. Rule 645; *Shepard v. Jones* (1882) 21 Ch. D. 469.

(c) *Beatty v. O'Connor* (1884) 5 Ont. 731.

(d) *Reddick v. Traders Bank of Canada* (1892) 22 Ont. 449.

signing judgment, on four clear days' notice, and judgment may be entered for the amount found due (e).

In taking the account the mortgagor may be given credit for sums which he would be entitled to set-off against the mortgagee (f).

**Surcharge
and
falsification.**

The mortgagor will be at liberty to surcharge or falsify (g).

The words "surcharge" and "falsification" have been defined as follows:—

"If any of the parties can show an omission for which credit ought to be given, that is a surcharge; if anything is inserted that is a wrong charge he is at liberty to show it, and that is a falsification (h)."

**Mortgagee
must account
for purchase
money as
cash.**

A mortgagee is entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but he must account for the purchase money as cash at the time of the sale, and he cannot charge the mortgagor with the discount on the mortgage or the costs of turning it into cash (i).

**Limitation
of action
for account.**

An ordinary action of account is barred after the lapse of six years from the time when the cause of action arose (j).

**Six years
limitation
does not
apply to
surplus after
sale under
power.**

But where a mortgagee has sold the lands under a power of sale according to the short forms act, an action may be brought by the mortgagor for an account although more than six years have elapsed from the time of sale. In such a case the mortgagee is an express trustee and section 32 of the *Trustee Act* (k) does not apply because if there is a surplus it is trust money still retained by the trustee (l).

(e) Ont. Rules 176, 596.

(f) *Dodd v. Lydall* (1841) 1 Ha. 333; *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573.

(g) *In re Webb, Lambert v. Still* [1894] 1 Ch. 73.

(h) *Pitt v. Cholmondeley* (1754) 2 Ves. Sen. 565.

(i) *Beatty v. O'Connor* (1884) 5 Ont. 731.

(j) R.S.O. (1977) c. 72, s. 2.

(k) R.S.O. (1977) c. 129.

(l) *Biggs v. Freehold Loan and Savings Co.* (1899) 26 Ont. App. 232; *In re Bell, Lake v. Bell* (1886) 34 Ch. D. 462.

PART V.

RIGHTS AND LIABILITIES OF THOSE CLAIMING UNDER THE MORTGAGOR.

CHAPTER XXXIII.

RIGHTS OF PURCHASERS OF THE EQUITY OF REDEMPTION.

A mortgagor may assign any rights incident to his ownership of the equity of redemption (a). But where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach for the benefit of the assignor a prior mortgage on the ground of fraud, the assignment was held to savour of champerty and no relief was granted to the assignee (b). Where, however, the assignee takes beneficially and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action (c).

A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where, therefore, a mortgagor made a lease of the mortgaged lands, and gave an order for rent in advance to the mortgagee, to be, and which was, applied by him in discharge of other liabilities

Equity of
redemption
may be
assigned.

Assignee
of equity
entitled to
rent:

(a) *Steers v. Rogers* [1893] A.C. 232.

(b) *Muchall v. Banks* (1862) 10 Gr. 25; and see *Little v. Hawkins* (1872) 19 Gr. 267; *Wigle v. Setterington* (1872) 19 Gr. 512; *Bell v. Walker* (1873) 20 Gr. 558; *Hilton v. Woods* (1867) L.R. 4 Eq. 432.

(c) *Seear v. Lawson* (1880) 15 Ch. D. 426, 434, C.A.; *Dickinson v. Burrell* (1866) L.R. 1 Eq. 337.

of the mortgagor, who afterwards transferred his equity of redemption to a *bona fide* assignee without notice of such advance of rent, it was held that the owner of the equity of redemption was entitled to have the amount of rent so advanced applied in payment of the mortgage debt (*d*).

entitled to
benefit of
covenants:

The purchaser of the equity of redemption is, in general, entitled to the benefit of covenants made by the mortgagee with the mortgagor. Thus where a mortgage contained a covenant to release any land sold during the continuation of the mortgage upon the payment of £200 per acre, and an assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion demanded a release from an assignee of the mortgagee, it was held that the benefit of this covenant would pass to an assignee of the equity of redemption, but that the mortgagee must receive the stipulated sum per acre upon the sale of the portion to be released, a general payment on the mortgage not being sufficient (*e*).

A mortgage on five stores expressed to be for \$10,500 contained a provision that the mortgagees would release the easterly store on payment of \$2500, and any one or more of the other four stores on payment of \$2,000 each, at any time on receiving a bonus of three months' interest on the sum so paid, and it was held that the benefit of this clause passed to the assignee of the equity of redemption, and that he was entitled to enforce it (*f*).

entitled to
surplus after
sale.

A purchaser of the equity of redemption is entitled to the surplus after a sale under the mortgage.

So where, after a sale of mortgaged premises in an action for sale, the mortgagor made an assignment for the benefit of creditors before certain prior execution creditors had established their claims in the Master's office to the

(*d*) *Gilmour v. Roe* (1874) 21 Gr. 284.

(*e*) *Webber v. O'Neil* (1864) 10 Gr. 440.

(*f*) *Clarke v. Freehold Loan and Savings Co.* (1888) 16 Ont. 598.

surplus, the assignee for creditors was held to be entitled to such balance freed from any liability to satisfy the executions out of it (g).

The purchaser of land, subject to a mortgage, does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay the mortgage money does not run with the mortgaged lands (h). And even although the purchaser of an equity of redemption covenants with the mortgagor to pay the mortgage money, as the expressed consideration for the conveyance, there is no privity of contract or implied obligation created thereby which will enable the mortgagee to sue the purchaser for the amount (i). And where a mortgagor has become insolvent and his assignees have sold the equity of redemption the purchaser is not bound to make good any deficiency there may be on a sale to realize the security (j).

Irrespective of the form of the contract between the parties, the rule is clear that where a person purchases an equity of redemption he is bound as between himself and his assignor in the absence of stipulation to the contrary to indemnify his vendor against the mortgage on the lands (k). In *Walker v. Dickson* (l) it was said:—

“It is familiar law, scarcely at this day requiring a reference to authorities, that where a person purchases an estate which is subject to a mortgage, meaning at the time of the contract to buy the estate subject to that incumbrance, he is liable in equity to indemnify his vendor against the incumbrance.”

(g) *Carter v. Stone* (1890) 20 Ont. 340.

(h) *Canada Landed and National Investment Co. v. Shaver* (1895) 22 Ont. App. 377.

(i) *Frontenac Loan and Investment Society v. Hysop* (1892) 21 Ont. 577.

(j) *Nichols v. Watson* (1876) 23 Gr. 606.

(k) *Thompson v. Wilkes* (1856) 5 Gr. 594; *Waring v. Ward* (1802) 7 Ves. 332; *Canavan v. Meek* (1883) 2 Ont. 636; *Boyd v. Johnston* (1890) 19 Ont. 598; *Jones v. Kearney* (1842) 1 Dr. & War. 134; *Bridgman v. Daw* (1891) 40 W.R. 253.

(l) (1892) 20 Ont. App. 96, at p. 102.

Not liable to mortgagee on the covenant to pay the mortgage debt.

Purchaser liable to indemnify the mortgagor.

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When, however, a mortgagor conveys his equity of redemption in the mortgaged property without any stipulation as to payment of the incumbrance, the right to indemnification against it does not arise from anything contained in the mortgage or conveyance but from the facts, and this may be rebutted by parol evidence or otherwise. The right, where it exists, arises from implied contract (*m*).

Presumption
may be
rebutted.

Although where land is sold subject to an outstanding mortgage there arises a presumption or supposed intention in equity on the part of the purchaser to indemnify the vendor against the mortgage (that is, if under the actual circumstances the parties are to be considered as having really occupied the relation of vendor and purchaser) yet this presumption may be rebutted by parol evidence, and it may be shown to be contrary to the real intention of the parties to the transaction in question (*n*). The implied obligation to pay off the incumbrance which, in the case of a conveyance of land to a person *sui juris*, is imposed by a court of equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property (*o*).

Married
woman.

Purchaser
in fact.

This equitable doctrine of the right to indemnity applies only as against a purchaser in fact, and therefore, where, at the request of the actual purchaser, the land in question was conveyed to his nominee by deed absolute in form, but for the purpose of security only, the nominee was held not liable to indemnify the vendor (*p*).

Assignee
may be
called on
to pay;

When a mortgagor who has covenanted for payment of the mortgage debt, sells his equity of redemption subject to such mortgage, a relation of suretyship arises between him and the purchaser as to the payment of the

(*m*) *Beatty v. Fizsimmons* (1893) 23 Ont. 245; *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664.

(*n*) *Corley v. Gray* (1887) 15 Ont. 1.

(*o*) *McMichael v. Wilkie* (1891) 18 Ont. App. 464.

(*p*) *Walker v. Dickson* (1892) 20 Ont. App. 96.

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mortgage debt, and if the debt is allowed to run into default the mortgagor will be entitled to call upon his assignee to pay it (*q*).

Where the purchaser of the equity of redemption even before covenants to indemnify the mortgagor the latter may maintain an action against the purchaser before he has been compelled to pay anything. *r*.

And if a mortgagor who has conveyed his equity of redemption subject to the mortgage is called on for payment by the mortgagee under the covenant for payment, the mortgagor is entitled as against the purchaser of the equity of redemption to a lien on the lands for the amount which he is compelled to pay (*s*).

When the equity of redemption has been sold under a writ of execution against lands the mortgagor, if compelled to pay the mortgage debt, may maintain an action therefor against the purchaser, and shall have a lien on the lands for the amount he has been compelled to pay (*t*).

A claim against a purchaser of any equity of redemption to be indemnified against the mortgage debt may be assigned by the mortgagor to the mortgagee, and is enforceable by the latter (*u*).

So where a mortgagor sells his equity of redemption in mortgaged lands and takes a covenant for payment of the mortgage debt from his grantee, who in turn sells and takes a like covenant for payment, which covenant he assigns to the mortgagor, the latter may maintain an action thereon against the last purchaser (*v*).

(*q*) *Campbell v. Robinson* (1880) 27 Gr. 634.

(*r*) *Cullin v. Rinn* (1887) 5 Man. R. 8; *Higgins v. Trusts Corporation of Ontario* (1899) 30 Ont. 684; *Mewburn v. Mackelcan* (1892) 19 Ont. App. 729.

(*s*) *Hamilton Provident Loan and Investment Co. v. Smith* (1888) 17 Ont. 1.

(*t*) *Execution Act*, R.S.O. (1897) c. 77, s. 32.

(*u*) *British Canadian Loan Co. v. Tear* (1893) 23 Ont. 664.

(*v*) *Small v. Thompson* (1897) 28 S.C.R. 219.

even before
mortgagor
has paid
anything.

Mortgagor
entitled to
lien on lands
for payments
made by him.

Sale of
equity under
execution.

Right to
indemnity
may be
assigned.

Covenant
to pay
mortgage
is one of
indemnity.

But a covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor he has satisfied his liability (*w*).

In *Smith v. Pears* (*x*) the plaintiff was mortgagee of certain lands under a mortgage made by one Phillips, who conveyed the equity of redemption to Hunter. Hunter in turn conveyed to Hewlett, who conveyed to the defendant Pears, each grantee giving a covenant to pay the mortgage moneys and indemnify his immediate grantor. Hewlett assigned to the plaintiff the covenant of the defendant Pears. The defendant Pears procured an assignment to himself of the covenant made by Hunter to Phillips, and of that made by Hewlett to Hunter. The plaintiff then sued the defendant Pears on the covenant given by the latter to Hewlett which had been assigned to the plaintiff. It was contended on behalf of the defendant that the covenant was one of indemnity only, and that a release having been obtained from the only persons who could damnify Hewlett, the liability of the defendant Pears under the covenant had been satisfied (*y*).

In delivering the judgment of the court MacLennan, J.A. said:—

"This case depends upon the construction of the covenant entered into by the defendant with his vendor Hewlett. Omitting immaterial words, it is that he will pay the said mortgage moneys and interest secured by the said in part recited mortgage in the manner therein prescribed, and will indemnify and save harmless the said Hewlett, his heirs, and assigns, from all loss, costs, charges and

(*w*) *Smith v. Pears* (1897) 24 Ont. App. 82.

(*x*) (1897) 24 Ont. App. 82.

(*y*) *Sutherland v. Webster* (1894) 21 Ont. App. 228; *Credit Foncier Franco-Canadian v. Lawrie* (1896) 27 Ont. 498; *Thompson v. Warwick* (1894) 21 Ont. App. 637.

damages sustained by him or them by reason of such default. My learned brother Rose has held that this is a mere covenant of indemnity, and that the defendant having obtained a release from the only person who could in any way damnify the covenantee or his heirs, he has thereby performed the obligation of his covenant, and that his having done so is a defence to the action. I am of opinion that his decision is right. When Hewlett sold and conveyed the land to the defendant he was not personally liable to the plaintiff the mortgagor. The Phillipses were the only persons who were so liable, and the sole object and purpose of the covenant in question was to protect Hewlett from his immediate vendor Hunter. It is true that as long as Hewlett was in danger from Hunter by reason of the non-payment of the mortgage Hewlett could have sued the defendant on his covenant and could have recovered the mortgage money, or so much thereof as remained unpaid: *Mewburn v. Mackelcun* (1892) 19 Ont. App. 729; *Lethbridge v. Myton* (1831) 2 B. & Ad. 772. But his recovery would be for the sole purpose of indemnity, and could be barred at any time by a release from Hunter. The following cases show that although the covenant is expressed to be a covenant for payment, it is still nothing more than a covenant for indemnity: *Barham v. Earl of Thanet* (1834) 3 My. & K. 607 at pp. 622-4; *Barry v. Harding* (1844) 1 J. & La T. 475 at p. 485, *per* Sugden, L.C. And that in such a case the person to whom the money is to be paid has no right of action either at law or in equity, is well settled: *Colyear v. Countess of Mulgrave* (1836) 2 Kee. 81. When Hewlett assigned his covenant to the plaintiff, he had no longer any interest in the land, and his sole right was to be indemnified against his obligation to Hunter. He could not assign to the plaintiff any higher or different right than he had himself. Therefore when the defendant obtained from Hunter a release of all claims against Hewlett the obligation under his covenant was fulfilled, and his liability was satisfied, and that part of the action was properly dismissed. The parties are standing on their strict rights. The plaintiff endeavoured to gain an advantage by acquiring from Hewlett an assignment of the covenant, and the defendant had an un-doubted right to protect himself by satisfying his obligation by obtaining the release which he has procured from Hunter."

An owner of an equity of redemption is entitled, upon selling it, to be indemnified by his vendee against payment of the mortgage moneys if he is liable therefor.

But where a person after parting with his equity of redemption paid the mortgage debt under threats of legal proceedings by his vendor, although he was not legally liable, he was held not entitled to recover the amount from the person to whom he had sold the equity of redemption (z).

Where a mortgage provides for future advances the interest of the purchaser of the equity of redemption cannot be charged with advances made after he purchased,

Owner of
equity is
entitled to
indemnity
from his
vendee.

Future
advances to
mortgagor.

(z) *Patterson v. Tanner* (1892) 22 Ont. 364.

if the mortgagee has notice of his interest; but it is otherwise if the mortgagee has no notice (*a*).

Right of purchaser of equity to redeem.

Liability of purchaser of equity to satisfy mortgages.

A purchaser of the equity of redemption may redeem the mortgage as fully as the mortgagor himself might have done, and on the same terms, and is entitled to a reconveyance of the lands or an assignment of the mortgage whenever the mortgagor would be so entitled.

But the purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under contract, express or implied, to discharge, cannot keep such charge alive against a mesne incumbrance, which by the terms of contract of purchase, express or implied, the purchaser was also bound to discharge (*b*).

Thus in *Thompson v. Warwick* (*c*) mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. The purchaser then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under a threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of themselves. It was held that the sub-purchaser, upon being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof without also paying the second mortgage.

And in *Muttlebury v. Taylor* (*d*) the owner of property mortgaged it and then sold subject to the mortgage, taking from the purchaser as part of his purchase money a second mortgage, which he assigned to the first mortgagee. The purchaser then sold to a sub-purchaser, who, to obtain an extension of time on the first mortgage, entered into a

(*a*) *Blackley v. Kenney* (No. 2) (1891) 18 Ont. App. 135; 29 C.L.J. 108.

(*b*) *Blake v. Beatty* (1855) 5 Gr. 359; *Thompson v. Warwick* (1894) 21 Ont. App. 637; *Muttlebury v. Taylor* (1892) 22 Ont. 312.

(*c*) (1894) 21 Ont. App. 637.

(*d*) (1892) 22 Ont. 312.

covenant with the mortgagee to pay it, and afterwards sold the property. In a foreclosure action the mortgagee claimed an order for the payment of the first mortgage by the sub-purchaser under his covenant, and the latter refused to pay the amount due on it unless the mortgagee would assign the mortgage to him; but it was held that the mortgagee was not bound to assign unless the sub-purchaser paid off both mortgages.

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at a sheriff's sale, and the purchaser paid off the prior mortgage, it was held that the purchaser being bound to protect the mortgagor against both incumbrances was not at liberty to keep alive the prior mortgage as against the second mortgagee (*e*).

The purchaser of the equity of redemption or other person redeeming is not entitled to any covenant from the mortgagee except the usual covenant against incumbrances (*g*).

A mortgagee who purchases the equity of redemption is entitled to keep his mortgage alive as against an intervening execution creditor of the mortgagor, in the absence of any act manifesting a contrary intention. But where after purchasing the equity of redemption he releases his mortgage, that is strong evidence that there was no intention to preserve his priority (*h*).

Where a person interested in the equity of redemption, but not personally liable for the mortgage debt, pays off a mortgage, there is no rule of law that the mortgage is extinguished. The question whether it is or is not extinguished is one of intention (*i*).

Person
redeeming
entitled to
covenant of
mortgagee
against in-
cumbrances.

Redemption
by person
not liable on
mortgage.

(*e*) *McDonald v. Reynolds* (1868) 14 Gr. 691.

(*g*) *Gooderham v. Traders Bank* (1888) 16 Ont. 438.

(*h*) *Buckley v. Wilson* (1861) 8 Gr. 566.

(*i*) *Mackenzie v. Gordon* (1838) 6 Cl. & F. 875, at p. 883; *Adams v. Angell* (1876) 5 Ch. D. 634; *Minter v. Carr* [1894] 3 Ch. 498; *Thorne v. Cann* [1895] A.C. 11.

Trustee in
bankruptcy.

Where a trustee in bankruptcy acquires a mortgage on property of the bankrupt, he is entitled to hold it to the extent of the amount secured for the benefit of the creditors (j).

The creator of successive mortgages, who has sold the equity of redemption, and who has been discharged by bankruptcy from his personal liability under the mortgages, may subsequently purchase the first mortgage and hold it as against puisne mortgagees, although he repurchases the equity of redemption (k).

Where a person entitled to the equity of redemption in A. pays off a mortgage on A. and B., the mortgage though it may determine as to A. will be kept alive as to B. (l).

Agreement
to sell lands
free from
incumbrance

As between vendor and purchaser, if the vendor agrees to sell an estate free from incumbrances, the purchaser can insist on having the incumbrances kept on foot for his benefit (m).

Apportion-
ment of the
mortgage
debt.

Where a mortgage is given on different properties to secure one debt, the general rule is that these properties as between those claiming under the mortgagor must bear the mortgage debt rateably in proportion to their respective values (n); and this applies where real property and personal property are mortgaged to secure the same debt (o); and also where different properties are mortgaged at different times to secure the same debt (p). The rights of those claiming mortgaged lands under conveyances from the mortgagor depend upon the agreement of the parties or the expressed intention of the mortgagor. It may be

(j) *Squire v. Ford* (1851) 9 Ha. 47, at p. 60; *Adams v. Angell* (1876) 5 Ch. D. 634, 647; *Craiknall v. Janson* (1877) 6 Ch. D. 735; *Bell v. Sunderland Building Society* (1883) 24 Ch. D. 618.

(k) *In re Howard's Estate* (1892) 29 L.R. Ir. 266.

(l) *Taws v. Knowles* [1891] 2 Q.B. 564, at p. 572.

(m) *Barry v. Harding* (1844) 1 J. & La T. 475; *Clark v. May* (1852) 16 Beav. 273; *Cooper v. Cartwright* (1860) Johns. 679.

(n) *Aldrich v. Cooper* (1803) 8 Ves. 382.

(o) *Trestrail v. Mason* (1878) 7 Ch. D. 655.

(p) *Leonino v. Leonino* (1879) 10 Ch. D. 460.

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stipulated that as between two or more properties subject to the same charge one shall bear the whole mortgage debt in exoneration of the other or others (q).

But where several properties are mortgaged to secure the same debt, and the mortgagor afterwards sells to different purchasers, giving to each purchaser a covenant against incumbrances, then as between the purchasers the properties are liable for the mortgage debt in succession, beginning with the property last sold (s).

This rule is founded on the doctrine of marshalling which may be stated thus:—A mortgagee or other creditor having two funds to which he may resort shall not disappoint another creditor who can resort only to one of those funds; in such a case the court will marshal the funds, without regard to the interests of the debtor, so as to satisfy the claim of the creditor having both funds out of that fund which will leave a fund for the other creditors (t).

In *Webb v. Smith* (u) Cotton, L.J. states the doctrine thus:—

"If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteneare, and must leave Blackacre, so that B., the other creditor, may follow it and obtain payment of his debt out of it: in other words, if two estates, Whiteneare and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go. There was also another class of cases in which the doctrine was applied, namely, where under the old law creditors by simple contract had no claim upon real assets, unless charged with or devised for the payment of debts, a court of equity would compel specialty creditors who might resort in the first instance to the personal estate, in priority of creditors by simple contract, and to the real assets, in exclusion of them, to recover satisfaction in the first place out of the real assets as far as they went" (v).

Rights of
purchasers
among
themselves.

Marshalling
securities.

(q) *In re Dunlop, Dunlop v. Dunlop* (1882) 21 Ch. D. 583.

(s) *Jones v. Beck* (1871) 18 Gr. 671; see also *Renwick v. Berryman* (1886) 3 Man. R. 387; *in re Jones, Farrington v. Forrester* [1893] 2 Ch. 461.

(t) *Aldrich v. Cooper, Durham v. Lankester, Durham v. Armstrong* (1802) 8 Ves. 382; 18 R.C. 198.

(u) (1885) 30 Ch. D. 192, at p. 200.

(v) See also *Dolphin v. Aylward* (1870) L.R. 4 H.L. 486.

In *Jones v. Beck* (*w*) the facts were as follows: A. the registered owner of Whiteacre and Blackacre and other lands mortgaged all the lands to the plaintiff. He then sold Whiteacre to B. and afterwards Blackacre to K. covenanting in each case against all incumbrances. The various instruments were registered immediately after execution thereof. The court held that B.'s right, as between B. and K., was to throw the whole mortgage, and not merely a rateable part, on Blackacre.

Marshalling.

The owner of lots A. and B. sold A., but the conveyance was not registered. He afterwards mortgaged A. and B., and the mortgagee registered the mortgage without notice of the prior deed. The mortgagor subsequently sold B. in portions by three successive sales. The assignees of the mortgage brought suit for a sale, and the decree directed that there should be a sale first of B.; and that if a sale of part of B. would produce enough the portion last parted with by the mortgagor should be first sold (*x*).

Purchaser
of part of
mortgaged
lands.

And where a person purchases part only of the lands comprised in the mortgage, with a covenant from the mortgagor against incumbrances, he is entitled, as against the mortgagor and subsequent purchasers of the other part with notice of his rights, to be indemnified out of such other part to the full extent of the value thereof against the amount due on the mortgage. Thus in *Pierce v. Canavan* (*y*) the owner of lots D. and E. mortgaged them. The mortgagee assigned the security and afterwards purchased the equity of redemption. The plaintiff subsequently purchased lot D., for which he paid the full value, and obtained a conveyance containing statutory covenants for title and possession. Lot E. was subsequently sold to

(*w*) (1871) 18 Gr. 671.

(*x*) *Barker v. Eccles* (1870) 17 Gr. 277; see also *Norris v. Meadows* (1882) 7 Ont. App. 237; *Fraser v. Nagle* (1888) 16 Ont. 241; *Buckler v. Bowman* (1866) 12 Gr. 457.

(*y*) (1882) 7 Ont. App. 187.

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a *bona fide* purchaser who conveyed to the defendant. The Court of Appeal held that the plaintiff had a right to be indemnified out of lot E. to the full extent of the value thereof against the amount due on the mortgage.

In *Clark v. Bogart* (z) several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who when he took his conveyance was not aware of the plaintiffs' mortgage. The mortgage was registered against the parcels embraced in it, though not against the other parcels. It was held that the plaintiffs had a right to require as between themselves and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. And it was also held that the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons, who purchased other parcels before he purchased, to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage and the right it conferred (a).

Where a mortgagee releases part of the mortgaged lands after he has received notice that the other part has been sold, he will not be entitled to charge the part sold with the amount due on the mortgage. But mere possession of the part sold by the purchaser thereof is not notice of his interest (b).

Satisfaction
of mortgage
comprising
several
parcels.

Mortgagee
releasing
part of
mortgaged
lands.

(z) (1880) 27 Gr. 450.

(a) See also *Rutherford v. Rutherford* (1896) 17 P.R. 228.

(b) *Beck v. Moffatt* (1870) 17 Gr. 601.

CHAPTER XXXIV.

RIGHTS OF THE EXECUTORS, ADMINISTRATORS, HEIRS AND
DEVISEES OF MORTGAGOR.

*Devolution
of Estates
Act.*

How equity
of
redemption
devolves.

Caution.

Lands not
disposed of
vest in
devisees
or heirs

The title of the heirs, devisees, executors and administrators to the estate of a deceased mortgagor is regulated by the *Devolution of Estates Act* (a).

By section 4 of that act lands subject to mortgage, upon the death of the mortgagor dying on or after the 1st day of July, 1886, devolve upon and become vested in his legal personal representatives from time to time, and become subject to the payment of his debts notwithstanding any testamentary disposition; and so far as the lands are not disposed of by will or otherwise they are divided among those entitled thereto as if they were personal property.

By section 13 of the *Devolution of Estates Act* provision is made for the registration of a caution by the executors or administrators against the lands of the testator or intestate within twelve months after his death. A caution is an instrument in writing signed by the executors or administrators certifying that it may be necessary for them, in the fulfilment of their duties, to sell the lands or part of them. And at the expiration of twelve months a further caution may be registered, and so on as long as may be necessary.

By the same section the lands of a person dying on or after the 4th day of May, 1891, not disposed of or conveyed by the executors or administrators within twelve months after the death of the owner, if no caution is registered, or within twelve months after the registration of the caution or the last caution, if one or more have been

(a) R.S.O. (1897) c. 127.

registered, shall be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto. Section 13 of the *Devolution of Estates Act* is as follows:—

13. (1) Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, subject to the *Land Titles Act* in the case of land registered under that act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs, (or their assigns, as the case may be) without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the registry office, or land titles office where the land is under the *Land Titles Act*, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of the registration of the last of such cautions if more than one are registered.

(2) The caution may be in the form or to the effect following:—

We (A.B. and C.D.) executors of (or administrators with the will annexed of, or administrators of) — who died on or about the — day of —, do hereby certify that it may be necessary for us under our powers and in fulfilment of our duties as executors (or administrators) to sell the real estate of the said —, or part thereof, (or the caution may specify any particular parts or parcels), and of this all persons concerned are hereby required to take notice.

Form of
caution.

And the execution of the said caution shall be verified by the affidavit of a subscribing witness in manner prescribed by the *Registry Act*.

(3) In case the caution specifies the tracts or parcels which the executors or administrators may have occasion to sell, the caution shall be effectual as to those tracts or parcels only.

(4) The executors or administrators before the expiration of the twelve months may file a certificate withdrawing the caution mentioned in the preceding subsections; or withdrawing the same as to any parcel of land specified in such certificate and such certificate of withdrawal may be to the effect following:

We — executors (or administrators) of — do hereby withdraw the caution heretofore registered with respect to the real estate of the said —, (or as the case may be).

(5) The certificate of withdrawal shall be verified by the affidavit of a subscribing witness which shall be in the following form, or to the like effect:

I, G. H., etc., make oath and say: I am well acquainted with A.B. and C.D. named in the above certificate; that I was present and did see the said certificate signed by the said A.B. and C.D.; that I am a subscribing witness to the said certificate and I believe the said A.B. and C.D. to be the persons who registered the caution referred to in the said certificate.

(6) Before the expiry of a caution another caution may be registered, and so on from time to time as long as the executors or administrators consider such action necessary and every such caution shall continue in force for twelve months from the time of its registration.

(7) The limitation of the operation of this section to the real estate of persons dying on or after the 4th day of May, 1891, shall not affect any conveyance made before the 13th day of April, 1897.

The rights of the heirs, executors, administrators or devisees of a deceased mortgagor as against the mortgagee are, in general, subject to the above provisions, those which the mortgagor would have had, if living.

A question often arises, however, as between the heirs or devisees entitled to the mortgaged lands on the one hand, and those entitled to the personal property of the mortgagor on the other, as to the payment of the mortgage indebtedness.

Independently of statute, the general personal estate of a testator or intestate is presumably liable to the payment of his mortgage debts, in exoneration of the mortgaged property, unless, in the case of a testator, sufficient evidence of contrary intention appears by his will (b).

This rule was altered in England by the act known as Locke King's Act. In Ontario similar provisions are contained in section 37 of the *Wills Act* (c), whereby the lands subject to the mortgage are primarily chargeable with payment of the mortgage debt, unless a contrary intention appears. Section 37 is as follows:—

Mortgaged lands primarily liable.

37. (1) Where any person has died since the 31st day of December, 1865, or hereafter dies seized of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum or sums of money by way of mortgage, and such person has not, by his will or deed or other document signified any contrary or other intention, the heir or devisee to whom such real estate descends or is devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the real estate so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage

(b) *Duke of Aneaster v. Mayer* (1785) 1 C.C. 454; 18 R.C. 176.

(c) R.S.O. (1897) c. 128.

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debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

(2) Nothing herein contained shall affect or diminish any right of the mortgagee on such real estate to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the first day of January, 1874 (d).

The person on whom a mortgagor has settled lands in mortgage by a conveyance to trustees is entitled to have the mortgage satisfied out of the settlor's general estate.

In *Lewis v. Moore* (e) certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death. It was held that the mortgage should be paid out of the settlor's general estate.

(d) In British Columbia the corresponding provision is to be found in R.S.B.C. (1897) c. 140; in Manitoba in R.S. Man. (1891) c. 150; in Nova Scotia in R.S.N.S. (1884) c. 89.

(e) (1897) 24 Ont. App. 393.

Settled lands
subject to
mortgage.

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CHAPTER XXXV.

RIGHTS OF EXECUTION CREDITORS OF MORTGAGOR.

Effect of
redemption
may be sold
under
execution.

A judgment creditor of a mortgagor having a writ of execution against lands in the hands of the sheriff of the county in which the lands lie may, under the *Execution Act* (a), have all the interest of the mortgagor in the mortgaged lands seized and sold to satisfy his debt. The equity of redemption in a freehold mortgage of real estate may be sold subject to the mortgage under an execution against lands of the owner of the equity, either in his lifetime or after his death, in the same manner as lands not subject to mortgage may be sold. The provisions of the *Execution Act* are as follows:—

29. Wherever the word "mortgagor" occurs in the next succeeding three sections it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after the word "mortgagor."

30. (1) The sheriff or other officer to whom a writ of execution against the lands and tenements of a mortgagor of real estate is directed, may seize, sell and convey all the interest of the mortgagor in the mortgaged lands and tenements.

(2) The equity of redemption in a freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements can now be sold under an execution.

Effect of
sale and
conveyance.

31. The effect of the seizure or taking in execution, sale and conveyance, of mortgaged lands and tenements, shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed, as well as at the time of the sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place; and the purchaser, his heirs, or assigns, may pay, remove or satisfy any mortgage, charge or lien which at the time of the sale existed upon the lands or tenements so sold, in like manner as the

(a) R.S.O. (1897) c. 77.

mortgagor might have done; and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor; and on payment of the mortgage money to the mortgagee by the purchaser, his heirs or assigns, the mortgagee, his heirs or assigns, shall, if required, give to the purchaser, his heirs or assigns, at his or their charge, a certificate of payment or satisfaction of the mortgage, which certificate may be in the following form, that is to say:

To the Registrar of the County of — : I, A.B., of — , do certify that C.D., of — , who has become the purchaser of the interest of E.F., of — , has satisfied all money due upon a certain mortgage made by the said E.F. to me, bearing date the — day of — 18— and registered at — of the clock in the forenoon (*as the case may be*) of the — day of — , in the same year (*or as the case may be*), and that such mortgage is therefore discharged.

As witness my hand, this — day of — , 18—

(signed) A.B.

E.H. of — }
G.H. of — } Witnesses.

And such certificate shall be of the like effect, and shall be acted upon by registrars and others to the same extent as if the same had been given to the mortgagor (b).

Prior to 1849 an equity of redemption could not be sold under execution (c). In that year the statute 12 Vict. chapter 73 was passed, the provisions of which are now contained in section 30 sub-section 1 of the *Execution Act*. It was held under the former act that the equity of redemption could not be sold after the death of the mortgagor under an execution against the executor (d). Consequently in 1863 the act was amended by 27 Vict. chapter 13 by the addition of the provisions now contained in sub-section 2 of section 30 of the present act.

The following decisions show that the right to sell an equity of redemption under the *Execution Act* is of a restricted nature.

A sale of one of several lots included in a single mortgage is unauthorized. The sheriff cannot sever the equity of redemption ; he may only sell the equity in all the

Formerly equity of redemption not saleable under execution.

Equity of redemption cannot be severed.

(b) In Nova Scotia the sale of the interest of a mortgagor of real estate is regulated by R.S.N.S. (1884) c. 124, which is similar in terms to the Ontario Act. In Manitoba by R.S. Man. (1891) c. 80. In New Brunswick by R.S.N.B. (1877) c. 42 & 47.

(c) See *Simpson v. Smyth* (1846) 1 E. & A. 9.

(d) *Lowell v. Bank of Upper Canada* (1863) 10 Gr. 57.

Lands in
different
counties.

lands comprised in the mortgage. And where the lands are in different counties the act does not apply (e).

So where four persons joined in executing a mortgage of their joint estate, and subsequently the interests of three of them were sold under executions, it was held that the sale was inoperative and that the owner of the equity of redemption had a right to redeem; and it was further held that the purchaser at the sheriff's sale, who was also the mortgagee, having gone into possession of the mortgaged estate, was bound to account for the rents and profits (f).

Two mortga-
ges on the
same land.

It was held that a valid sale could not be made where there were two mortgages held by different persons upon the same property (g). This decision, however, was questioned in a later case (h).

But the equity of redemption in a portion of the lands and the fee in another portion may be sold together under a writ against lands (i).

Mortgagee
purchasing.

Where the judgment creditor, being also mortgagee, purchases at a sheriff's sale the equity of redemption in the lands comprised in his mortgage, bidding therefor just enough to cover the amount due on the execution but paying no money except the costs of the sheriff, the sale is not a real sale and the sheriff's deed made in pursuance thereof is void (j). The position of a mortgagee purchasing the equity of redemption at a sheriff's sale is different from that of a stranger who purchases. A mortgagee purchasing, even if he is the holder of the judgment under

(e) *Heward v. Wolfenden* (1868) 14 Gr. 188; *Vannorman v. McCarty* (1869) 20 U.C.C.P. 42.

(f) *Cronn v. Chamberlin* (1880) 27 Gr. 551.

(g) *Donovan v. Bacon* (1869) 16 Gr. 472, note; *Wood v. Wood* (1869) 16 Gr. 471.

(h) *Samis v. Ireland* (1879) 4 Ont. App. 118.

(i) *Samis v. Ireland* (1879) 4 Ont. App. 118.

(j) *Samis v. Ireland* (1879) 4 Ont. App. 118.

which the sale takes place, must give to the mortgagor a release of the mortgage debt (*k*).

A sale under two executions, only one of which binds the debtor's lands, cannot be upheld (*l*).

Where the execution was against three defendants jointly, each of whom had given a mortgage on lands which belonged to himself and not to the others, and the sheriff sold the equity of redemption of all the defendants in all the lands, the sale was upheld (*m*).

Where mortgaged lands are sold by the sheriff the purchaser acquires only the title that the mortgagor had at the time the writ was delivered to the sheriff, not the title that the mortgagor had at the time of entering judgment (*n*). The purchaser of an equity of redemption under a writ of execution is entitled to possession as against the mortgagor in possession (*o*); but not as against a prior mortgagee in possession (*p*).

Where a writ of execution after renewal was lost in transmission to the sheriff through the mail, an order was made for the issue of a new writ, *nunc pro tunc*, to bear the same indorsements and evidence of renewal as the original writ; the order further directing that the substituted writ should have the same force and effect as the original (*q*).

A sale of the equity of redemption under an execution against the mortgagor will not be set aside, in the absence of fraud or irregularity, merely on the ground of the inadequacy of the price obtained (*s*).

(*k*) R.S.O. (1897) c. 77, s. 32; *Samis v. Ireland* (1879) 4 Ont. App. 118.

(*l*) *Samis v. Ireland* (1879) 4 Ont. App. 118.

(*m*) *Rathbun v. Culbertson* (1875) 22 Gr. 465.

(*n*) *Pegge v. Metcalfe* (1856) 5 Gr. 628.

(*o*) *Fiskin v. McMullen* (1862) 12 U.C.C.P. 85.

(*p*) *Doe d. Richardson v. Dickson* (1832) 2 U.C.O.S. 292.

(*q*) *Fairchild v. Crawford* (1896) 11 Man. R. 330.

(*s*) *Parr v. Montgomery* (1880) 27 Gr. 521.

Sale of lands subject to several mortgages.

Title acquired by purchaser.

Possession.

Loss of writ.

Setting aside sale.

Execution
creditors are
“assigns.”

Execution
creditor may
restrain
cutting of
timber.

Execution
creditor,
who is also
mortgagee,
impeaching
prior mort-
gage.

Order for
sale.

Mortgage
created by
deed abso-
lute in
form.

Equity of
redemption
in leaseholds

Execution creditors of the mortgagor are “assigns,” and are entitled to notice of sale under a power of sale the terms of which require notice to be given to assigns of the mortgagor; but only those having executions in the sheriff’s hands at the time notice of default is given are entitled to notice (*t*).

Where a mortgagor in possession was felling timber, the court, at the instance of a judgment creditor of the mortgagor who had an execution against lands in the hands of the sheriff, restrained future cutting by the mortgagor, it being shown that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor (*u*).

A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor who has accepted a mortgage does not thereby lose his right as a judgment creditor to impeach the prior mortgage (*v*).

A decree for sale of the equity of redemption may be made at the instance of a judgment creditor, even although there is no writ of execution in the sheriff’s hands (*w*).

The act does not apply where the right to redeem does not appear on the face of the conveyance, as, for example, where the mortgage has been created by a deed absolute in form (*x*).

The equity of redemption in a term of years cannot be sold under an execution (*y*).

The right of an execution creditor under an execution against lands in the hands of the sheriff of the county in which the lands of the debtor are situate is a “lien,” and

(*t*) *Re Abbott and Medcalf* (1891) 20 Ont. 299.

(*u*) *Wason v. Carpenter* (1867) 13 Gr. 329.

(*v*) *Warren v. Taylor, Ross v. Taylor* (1862) 9 Gr. 59.

(*w*) *Johnson v. Bennett* (1882) 9 P.R. 337; *Kerr v. Styles* (1879) 26 Gr. 309.

(*x*) *McCabe v. Thompson* (1857) 6 Gr. 175; *McDonald v. McDonell* (1864) 2 E. & A. 393; *Fitzgibbon v. Duggan* (1865) 11 Gr. 188.

(*y*) *Doe d. Webster v. Fitzgerald* (1839) E. T. 2 Vict. R. & J. Dgt. 1429; see also *McDonald v. Reynolds* (1868) 14 Gr. 691.

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the money mentioned in the writ is "money charged upon land." Taking steps to sell under such a writ is a "proceeding," and if the writ, although duly renewed, has been more than ten years in the sheriff's hands, and no payment or acknowledgment has in the meantime been made or given, as required by section 23 of the *Real Property Limitation Act* (*z*) the lien is gone, and proceedings on the writ will be restrained (*a*).

Where the equity of redemption cannot be sold under a writ against lands, a receiver may be appointed by way of equitable execution at the instance of a judgment creditor (*b*)

A receiver may be appointed *ex parte* of a mortgaged estate by way of execution against the mortgagor (*c*).

Surplus money in the hands of mortgagees after sale under a power of sale in a mortgage is attachable (*d*).

A judgment creditor, who had obtained a garnishee order against a mortgagor debtor of his debtor, was held not entitled to surplus proceeds of a sale by a prior mortgagee which took place after his garnishee order; but the holder of a garnishee order obtained after the sale against the prior mortgagee was held entitled (*e*).

A judgment creditor who has attached rents, accruing due from several tenants to the judgment debtors, before any of the gale days has arrived, is entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order. But it is doubtful whether the rents could be garnished as against a mortgagee of the landlord (*f*).

Receiver
by way of
equitable
execution.

Attachment
of surplus
proceeds
of sale..

Attachment
of rents.

(*z*) R.S.O. (1897) c. 133.

(*a*) *Neil v. Almond* (1897) 29 Ont. 63; see also *Price v. Wade* (1891) 14 P.R. 351.

(*b*) *Donovan v. Bacon* (1869) 16 Gr. 472, note; *Kerr v. Styles* (1879) 26 Gr. 309.

(*c*) *Minter v. Kent, Sussex and General Land Society* (1895) 72 L.T. 186.

(*d*) *Nicol v. Ewin* (1878) 7 P.R. 331; see also *McKay v. Mitchell* (1860) 6 U.C.L.J.O.S. 61.

(*e*) *Chatterton v. Watney* (1881) 16 Ch. D. 378; 17 Ch. D. 259.

(*f*) *Massie v. Toronto Printing Company* (1887) 12 P.R. 12; see *Greer v. Cauchon* (1886) 3 Man. R. 248.

Dower at
common law.

Requisites
of dower.

Inchoate
right of
dower.

Right may
be barred
in husband's
lifetime.

Dower at common law was where the husband of a woman was seised of an estate of inheritance and died; in that case the wife was entitled to the third part of all lands and tenements whereof the husband was seised at any time during the coverture to hold to herself for the term of her natural life.

The requisites of dower were marriage, seisin of the husband and death of the husband.

An inchoate right of dower is a right begun but not completed; a right where the two first requisites have happened but not the third. It is merely a prospective right which a woman has in the lands of her husband while he is living; it may ripen into an actual right on his death, and it may be defeated by her death before her husband's, or in certain cases by alienation before her husband's death. If the husband is seised of the legal estate in lands at any time during the coverture, even momentarily, the right of dower attaches. The seisin need not be actual seisin or possession; seisin in law is sufficient.

In the North-West Territories no widow whose husband died on or after the 1st day of January, 1887, is entitled to dower in the land of her deceased husband; but she shall have the same right in such land as if it were personal property (z). In Manitoba there is a similar provision (a).

If a husband at the time of marriage has only a right of entry or action, and his right to recover posses-

(z) 57-58 Viet. (D.) (1894) c. 28, s. 6.

(a) R.S. Man. (1891) c. 45, s. 19.

CHAPTER XXXVI.

RIGHTS OF A DOWRESS IN MORTGAGED LANDS.

sion has been barred in his lifetime by lapse of time, his widow will not be entitled to dower. If his right has not been barred at his death his widow will be entitled to dower in the land; but she cannot enforce the right after the expiration of the time within which her husband, if living, might have enforced his right to possession. This is provided by section 3 of the *Dower Act* (b) which is as follows :—

3. Where a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced (c).

But if the husband has possession at any time during coverture the wife's right to dower is not affected, although he may have been dispossessed during coverture and his right to recover possession may have been barred by lapse of time. In that case the widow has after the husband's death the full time allowed by statute within which to enforce her right (d).

A widow has no right to dower out of lands which at the time of alienation by the husband or at the time of his death, if he died seised thereof, were in a state of nature. Section 4 of the Ontario *Dower Act* (e) is as follows :—

4. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land, which, at the time of the alienation by the husband or at the time of his death, if he died seised thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purpose of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the dowress under section 9 of the *Dower Procedure Act*, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel (f).

(b) R.S.O. (1897) c. 164.

(c) In Nova Scotia this provision was enacted by 61 Vict. (N.S.) (1898) c. 23, s. 7; in New Brunswick the corresponding section is C.S.N.B. (1877) c. 73, s. 2; in British Columbia R.S.B.C. (1897) c. 63, s. 4.

(d) *McDonald v. McMillan* (1864) 23 U.C.R. 302.

(e) R.S.O. (1897) c. 164.

(f) In Nova Scotia there is a similar enactment, 61 Vict. (N.S.) (1898) c. 23, s. 8.

Possession
at any time
during
coverture.

No dower in
wild lands.

Mining lands.

The right of a widow to dower in mining lands is regulated by section 5 of the Ontario *Dower Act* which is as follows:—

5. No dower shall be recoverable out of any land which has been heretofore or shall be hereafter granted by the Crown as mining land in case such land is on or after the 31st day of December, 1897, conveyed to the husband of the person claiming dower and such husband does not die entitled thereto.

Lands held in joint tenancy.

A widow is not entitled to dower out of lands to which her husband at the time of his death was entitled as joint tenant; for the estate is not an estate of inheritance, but passes on the death of the husband to the surviving joint tenant. The widow of the survivor would, however, be entitled to dower (g).

Lands held by tenants in common.

But the estate of a tenant in common in lands other than partnership lands is an estate of inheritance and is subject to dower (h).

Estates in remainder.

An estate is not subject to dower unless it be an estate of inheritance in possession. An estate in remainder or reversion in fee, expectant on a life estate, is not subject to dower if the husband sell his estate or die during the currency of the life estate, for the seisin is in the life tenant (i).

Equitable estates.

At common law a widow was not entitled to dower in any equitable estate to which her husband was entitled at the time of his death, for the seisin was in the person having the legal estate. But now by statute a widow may be entitled to dower out of equitable estates of the husband. Section 2 of the Ontario *Dower Act* (j) is as follows:—

2. Where a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy), then his widow shall be entitled to dower out of such land (k).

(g) *Haskill v. Fraser* (1862) 12 U.C.C.P. 383.

(h) *Ham v. Ham* (1857) 14 U.C.R. 497; *In re Music Hall Block, Dumble v. McIntosh* (1884) 8 Ont. 225.

(i) *Leitch v. McLellan* (1883) 2 Ont. 587.

(j) R.S.O. (1897) c. 164.

(k) In Nova Scotia the corresponding enactment is 61 Vict. (N.S.) (1898) c. 23, s. 6; in New Brunswick C.S.N.B. (1877) c. 73, s. 1; in British Columbia R.S.B.C. (1897) c. 63, s. 3.

The general rule is that where a woman is entitled to dower at common law she is so entitled whether her husband alienes the land before his death or not.

But in British Columbia no widow is entitled to dower out of any land which has been absolutely disposed of by her husband in his lifetime or by will (*l*).

Under section 3 of the Ontario *Dower Act* the widow is not entitled to dower in equitable estates unless her husband dies beneficially entitled thereto. Thus in *Smith v Smith (m)* a person equitably entitled to lands, who had not paid his purchase money or obtained a conveyance, created a mortgage thereon containing a power of sale in default of payment. The power of sale was exercised after the death of the mortgagor. Afterwards the widow of the mortgagor claimed dower, but it was held that dower attaches only to such equitable estates as the husband dies seised of; and that the sale when made had relation to the time of creating the power, thereby over-reaching the title to dower.

An exception to this rule is created by section 7 of the Ontario *Dower Act* which is as follows :—

7. (1) No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgagor or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument (*n*).

(2) In the event of a sale of the land comprised in such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to

(*l*) R.S.B.C. (1897) c. 63, s. 5. The British Columbia statute contains the following sections :—

6. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

7. A widow shall not be entitled to dower out of any land of her husband when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

(*m*) (1852) 3 Gr. 451.

(*n*) In Nova Scotia there is a similar enactment, 61 Vict. (N.S.) (1898) c. 23, s. 19.

Widow entitled to dower in equitable estates only if husband dies beneficially entitled.

dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold (o).

This section was first enacted in 1879 (p), and applies only to mortgages made after the 11th day of March, 1879 (q). Prior to this enactment, if a married woman joined with her husband in a mortgage to bar her dower, she was not entitled to dower in the equitable estate which remained in her husband after the mortgagage, unless he died beneficially entitled thereto; and the husband might defeat the claim to dower by a transfer in his lifetime of his equitable estate (r).

Wife joining
to bar dower
now
entitled
whether or
not husband
dies seised.

The effect of the enactment of 1879 is that a married woman is entitled to dower out of an equity of redemption in land, whether or not her husband dies seised of it, where such an equity has arisen by his having executed a mortgage of the legal estate in which she has joined to bar her dower (s).

In *Re Luckhardt* (t) Ferguson, J. said:—

"Before the passing of the act 42 Vict. c. 22 (Ont.) (tt) a married woman was entitled to dower out of an equitable estate, only when the husband died seised of it. Since the passing of that act, she is entitled to dower out of an equitable estate regardless of the husband's dying seised of it, when the equitable estate comes into existence by the husband, being owner of the land, executing a mortgage upon it, in which the wife joins to bar dower. The husband then has the equity of redemption, an equitable estate in the land of which, before the execution of such mortgage, he was the owner. This is the equitable estate out of which dower seems to be given by that statute."

(o) As to right to dower under the *Land Titles Act* where land is acquired subject to a charge, or where the owner after charging the land marries, see R.S.O. (1897) c. 138, s. 50. In Nova Scotia a similar provision has been enacted by 61 Vict. (N.S.) (1898) c. 23, s. 9.

(p) 42 Vict. (Ont.) c. 22.

(q) *Martindale v. Clarkson* (1880) 6 Ont. App. 1.

(r) *Moffatt v. Thomson* (1851) 3 Gr. 111; *Robertson v. Robertson* (1878) 25 Gr. 486; *Beavis v. Maguire* (1882) 7 Ont. App. 704; *Fleury v. Pringle* (1878) 26 Gr. 67.

(s) *Pratt v. Bunnell* (1891) 21 Ont. 1; *In re Luckhardt* (1898) 29 Ont. 111; *Martindale v. Clarkson* (1880) 6 Ont. App. 1.

(t) (1898) 29 Ont. 111, at p. 117.

(tt) Now R.S.O. (1897) c. 164, s. 7.

Under this section it has been held that a wife who joins in a mortgage to bar her dower is entitled to dower notwithstanding a conveyance by her husband of the equity of redemption without her concurrence (*u*).

In *Pratt v. Bunnell* (*v*) Street, J. said:—

"Section 5 (*vv*) appears to settle conclusively in favour of the wife the question as to the right of the husband to convey away, without his wife's concurrence but free from her dower, the equitable estate remaining in him after a mortgage in which she had joined; because, to hold otherwise would be to hold that the bar of dower in the mortgage operated not only to give full effect to the right of the mortgagee under the mortgage, but also enabled the husband to deal with the equity left in him to the prejudice of his wife's dower in it; and this would be contrary to the express provision in the section. An equity of redemption created in this way, that is, by a mortgage of the husband's legal estate, the wife joining to bar dower is, therefore, under section 5 [now section 7] an exception to the general rule contained in section 1 [now section 2] of the same Act which gives a wife dower only in those equitable estates of which her husband dies seised."

In cases not covered by section 7 the general rule provided by section 2 applies and the wife will not be entitled to dower out of an equitable estate unless the husband dies beneficially entitled, and the husband may defeat her claim by selling the estate even without her concurrence there-to (*w*). Thus she will not be entitled to dower out of an equity of redemption purchased and sold by the husband in his lifetime, the legal estate never having vested in him (*x*).

No dower in
an equity of
redemption
purchased
and sold by
husband.

Where a purchaser of land subject to a mortgage paid off the mortgage and procured a discharge in favour of the mortgagor, and on the same day obtained his conveyance from him, giving back a mortgage, with bar of dower, for the balance of the purchase money, all of which instruments were registered in the above order, it was held that the

(*u*) *Pratt v. Bunnell* (1891) 21 Ont. 1; *Gemmill v. Nelligan* (1895) 26 Ont. 307; *In re Luckhardt* (1898) 29 Ont. 111.

(*v*) (1891) 21 Ont. 1, at p. 6.

(*vv*) now R.S.O. (1897) c. 164, s. 7.

(*w*) *Gardner v. Brown* (1890) 19 Ont. 202.

(*x*) *In re Luckhardt* (1898) 29 Ont. 111; *Gardner v. Brown* (1890) 19 Ont. 202; *Craig v. Templeton* (1860) 8 Gr. 483.

wife of such purchaser was not entitled to dower out of a surplus arising on a sale under a subsequent incumbrance, her husband never having been even momentarily seized of the legal estate in the land (z).

A married woman is not entitled to a declaration that she has an inchoate right of dower.

Quantum of dower.

Dower on basis of whole amount realized.

Mortgage for unpaid purchase money.

In *Bunnell v. Gordon* (a) the plaintiff had joined in a mortgage with her husband to bar dower, and her husband had afterwards assigned his equity of redemption to an assignee for the benefit of creditors, and the mortgagees were taking proceedings to sell. The plaintiff claimed a declaration that she was entitled to an inchoate right of dower and to have a portion of any surplus on such sale set apart to answer her dower, when it should arise on the death of her husband. The declaration was refused, it being held that what was asked was a declaration as to a claim which might be made by another or others under circumstances which might or might not happen.

Where the mortgage has been made on or after the 16th day of April, 1895, the amount to which a dowress is entitled, where the lands are sold under power of sale or legal process, is governed by section 8 of the Ontario *Dower Act* (aa) which is as follows:—

8. (1) In the event of the land comprised in any mortgage or other instrument executed on or after the 16th day of April, 1895, by which the mortgagor's wife barred her dower, being sold under any power of sale contained in the mortgage, or under any legal process, the wife shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land had the same not been sold; and the amount to which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only.

(2) This section shall not apply where the mortgage is for the unpaid purchase money of the land; and nothing in this section contained shall be construed to affect, by implication or otherwise, any question in the case of mortgages executed before the said 16th day of April, 1895.

(z) *In re Luckhardt* (1898) 29 Ont. 111.

(a) (1890) 20 Ont. 281.

(aa) R.S.O. (1897) c. 164.

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Where lands were mortgaged before the 16th day of April, 1895, to secure a loan, not being for part of the purchase money, the wife of the mortgagor who joined in the mortgage to bar her dower was held to be entitled to dower out of the surplus computed on what would be the full value of the land if unincumbered (b). And where lands were mortgaged to secure part of the purchase money, the wife of the mortgagor, who joined in the mortgage for the purpose of barring her dower, was declared entitled to dower in the surplus, computed not on the whole unincumbered value of the land but as if the surplus were the whole value of the land (c).

Dower in full value of the lands.

In Ontario the following provisions of the *Dower Act* (d) are of practical importance in relation to mortgages.

Under section 9 a mortgagee may pay into court the surplus arising from a sale of the mortgaged lands to be dealt with on a summary application. Section 9 is as follows:—

9. (1) A mortgagee or other person holding any money out of which a married woman shall be dowable under the preceding two sections of this Act may pay the same into the High Court to the credit of such married woman and the other persons interested therein.

(2) The High Court or a Judge thereof, may on a summary application by petition or motion, make such order for securing the right of dower of any married woman, in any money out of which she shall be dowable, as may be just.

Section 10 provides that—

10. A widow shall not be entitled to take her interest in money under sections 7 and 8 of this Act, and in addition thereto a share of the money as personal estate.

Where a statutory mortgage did not contain a bar of dower, the wife, however, being a party to and executing the mortgage, the court refused to reform the mortgage

Mortgage given to secure purchase money: dower in surplus only.

Mortgage from which dower clause omitted will not be reformed without consideration.

(b) *Gemmill v. Nelligan* (1895) 26 Ont. 307; *Doan v. Davis* (1876) 23 Gr. 207; *Robertson v. Robertson* (1878) 25 Gr. 486; *Re Hague, Traders Bank v. Murray* (1887) 14 Ont. 660.

(c) *Pratt v. Bunnell* (1891) 21 Ont. 1, as explained in *Gemmill v. Nelligan* (1895) 26 Ont. 307; *Campbell v. Royal Canadian Bank* (1872) 19 Gr. 334.

(d) R.S.O. (1897) c. 164.

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Wife may
not claim
dower if she
executes
mortgage.

Mortgage
executed
before April
16th, 1895.

Right of
widow as
against
creditors.

Devise of
lands in lieu
of dower.

by inserting a proper bar of dower, there being no consideration to support a contract by the wife with the mortgagees to bar her dower (*e*).

It is provided, however, by the *Dower Act* (*f*) that no action of dower shall be maintained where a wife joins in a conveyance of lands of her husband although the clause providing for bar of dower is omitted. The statutory provisions are as follows:—

22. (3) Nor shall an action of dower be maintained where a wife on or after the 16th day of April, 1895, has joined or hereafter joins in a deed purporting to convey the land, or has signed or signs, otherwise than as a witness, a deed by which her husband conveys or purports to convey the land, notwithstanding that the deed in either case contains no words purporting to convey or release her dower or other estate or interest in the land.

(4) Nor shall an action of dower be maintained where the wife did prior to the said 16th day of April, 1895, join in or sign any such deed; but this subsection is not to be construed as prejudicing or affecting in any way the rights of third persons claiming the land or some interest therein under a subsequent deed or mortgage executed by the wife prior to the said 16th day of April, 1895, and containing a conveyance or release of her dower or other estate or interest.

If a woman joins with her husband in executing a mortgage to secure money borrowed by the husband, no portion of which is received by her to her own use, and after the husband's death the land is sold at the instance of creditors, the widow is entitled even as against them to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage. In the event of no surplus the widow may only claim as a creditor of her husband (*g*).

Where a testator devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower, and gave the residue of his lands and all his personal estate to his father, subject to the payment by his executors of all his just debts, funeral and other expenses, it

(*e*) *Bellamy v. Badgerow* (1893) 24 Ont. 278.

(*f*) R.S.O. (1897) c. 164, s. 22, sub-s. 3, 4, first enacted in 1895 by 58 Vict. c. 25, ss. 1, 2.

(*g*) *In re Robertson* (1877) 24 Gr. 442; *Sheppard v. Sheppard* (1867) 14 Gr. 174.

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was held that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her freed from the debts of the testator (*h*).

Where a wife joins in a mortgage, and on the death of the husband there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors (*i*).

The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower to the extent of the mortgage only, has the right to redeem during her husband's lifetime and is a necessary party to an action of foreclosure in the first instance. And where she was not so made a party and judgment of foreclosure was recovered in her absence, she was, after judgment and report, added as a defendant upon her own petition and permitted to redeem, or to pay off and obtain an assignment of the mortgage (*j*). Right to
redeem.

Even after sale of the mortgaged lands under judgment of the court a dowress may be allowed to come in and prove her claim (*k*).

Where a widow entitled to dower did not join in a first mortgage but joined in a second mortgage to bar her dower, and the second mortgagee obtained priority over the first by prior registration, the widow was held entitled to the surplus arising from a sale under the second mortgage in priority to the first mortgagee (*l*). Priority.

The Ontario *Dower Act* (*m*) contains the following provisions:— Dower where
wife is a
lunatic.

11. Where a person, whose wife is a lunatic and confined as such in a public lunatic asylum in this Province, has heretofore while his wife

(*h*) *Dungey v. Dungey* (1877) 24 Gr. 455.

(*i*) *Baker v. D'wbarn* (1872) 19 Gr. 113; *White v. Bastedo* (1869) 15 Gr. 546.

(*j*) *Blong v. Fitzgerald* (1893) 15 P.R. 467.

(*k*) *Hyde v. Barton* (1880) 8 P.R. 205.

(*l*) *Gray v. Coughlin* (1891) 18 S.C.R. 553; reversing S.C. *sub nom.* *MacLennan v. Gray* 16 Ont. App. 224.

(*m*) R.S.O. (1897) c. 164.

was so confined, become the owner of land or hereafter while she is so confined becomes the owner of land, such person may sell and convey or mortgage such land, freed and discharged of any claim of his said wife for dower therein, but no such conveyance or mortgage shall be made after the discharge of the said wife from the said asylum.

Dower where
wife living
apart from
her husband.

12. (1) Where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony, and such owner is desirous of selling or mortgaging the land free from dower, he may apply to a Judge of the High Court, and, if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon notice (to be served personally unless the Judge otherwise directs), dispense with the concurrence of the wife for the purpose of barring her dower, and he shall (unless the wife has been so living apart from her husband under such circumstances as disentitle her to dower) ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best; and thereupon a conveyance or mortgage by the husband, expressed to be free from his wife's dower, shall, subject to any terms mentioned in the order, be sufficient to bar her right thereto, as if she had duly executed a deed jointly with her husband for that purpose.

(2) This section shall extend to any case in which an agreement for sale had been made, and a conveyance executed by the husband before the 5th day of March, 1880, and part of the purchase money retained by the purchaser on account of dower or an indemnity given against such dower.

Application
where wife a
lunatic
confined in
asylum.

13. (1) Where an owner of land whose wife is a lunatic, or of unsound mind, and confined as such in a lunatic asylum, is desirous of selling or mortgaging the land free from dower, he may apply in that behalf to the Judge of the County Court of the county in which he resides or to a Judge of the High Court, and if the Judge approves, he may, by an order to be made by him in a summary way, upon such evidence as to the Judge seems meet, and either *ex parte* or upon such notice as he may deem requisite, dispense with the concurrence of the wife for the purpose of barring her dower, and he shall also ascertain and state in the order the value of such dower, and order such amount to remain a charge upon the property, or to be secured otherwise for the wife's benefit, or to be paid and applied for her benefit as he deems best, and thereupon a conveyance or mortgage by the husband, expressed to be free from his wife's dower, shall, subject to the terms and conditions mentioned in the order, be sufficient to bar her right thereto, as if she were of sound mind, and had duly executed a deed jointly with her husband for that purpose.

(2) On every such application the Judge shall be entitled to his own use to a fee of \$5, and no other fee or charge of any kind shall be payable in respect thereof.

(3) This section shall apply to any case in which an agreement for sale has been made and a conveyance has been executed by the husband, and any part of the purchase money has been retained by the purchaser on account of dower, and to any case in which an indemnity has been given against the dower of the wife.

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14. (1) In case the gaol surgeon of any county or district in which a married woman resides, and another medical practitioner to be named by the Judge, shall each certify (Form A) that he has personally examined such married woman and that he is of opinion that she is insane, and the Judge of the County Court of the county in which such married woman resides, or a Judge of the High Court, also certifies (Form B) that he has personally examined such married woman, and that from such examination and from the evidence adduced before him, if such Judge thinks it expedient to hear evidence, he is of opinion that such married woman is insane, the said Judge may make the like order as by the preceding section of this act, is authorized in the case of a married woman of unsound mind who is confined in an asylum for the insane.

Application
where wife is
a lunatic but
not confined
in asylum.

(2) The examination and certificates required by this section must all be made and granted within a period of one month, or such certificate shall not be acted upon by the said Judge, and the application shall not be entertained unless it is made within one month of the day upon which the last of such examinations took place.

15. In case a Judge makes an order under any of the preceding three sections of this act, with reference to any parcel of land, he may afterwards make orders in respect of other sales or mortgages, either on the like evidence as is required for the first application, or on any other evidence which may satisfy him of the continued insanity of the married woman.

Subsequent
orders.

16. Sections 12, 13, 14 and 15 of this act shall apply to any case where any person owns, or has the right to sell or mortgage (whether as trustee or otherwise) land which is subject to dower, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the dowress.

17. (1) Where the wife of an owner of land has been living apart from her husband for five years or more, and the husband sells and conveys, or has sold and conveyed the land, or mortgages, or has mortgaged the same, the wife not joining in the conveyance or mortgage, and the purchaser or mortgagee having no notice that the grantor or mortgagor had a wife living at the time, such purchaser or mortgagee may apply to a Judge of the High Court and have the same relief or to the same effect, and subject to the same conditions, and by the same proceedings, as provided for a husband of a lunatic wife under this act.

Where wife
has been
living apart
from her
husband for
five years.

(2) The rule and practice shall be the same where the husband is living with or recognizing another woman as his wife, the purchaser or mortgagee having no notice of her not being his wife and no notice that the grantor or mortgagor had a rightful wife with whom he is not living.

(3) Any person claiming under the grantee or mortgagee shall be entitled to apply in like manner and obtain like relief on the foundation of the right of the said grantee or mortgagee in that behalf, or of the applicant's own interest having been acquired by purchase for value in good faith without notice of the owner aforesaid having had a wife at the time of the conveyance or mortgage, and such owner may apply in like manner and have like relief.

Relief of
persons
claiming
under
mortgagee.

18. The order may be in duplicate or in as many parts as are necessary, and shall be signed by the Judge, and may be registered in the registry office of the registry division wherein the lands to which the

Registration
of order.

same relates are situate, upon its production and deposit, without any proof thereof; and such registration may take place either before or after the execution of the deed made in pursuance of such order.

Order may be
indorsed
on deed.

19. The order may, if desired, be indorsed or written upon the deed to which the same relates, in which case it shall be registered as part of the deed.

20. For the registration of the order including all necessary entries and certificates, the registrar shall be entitled to a fee of \$1, unless the order is indorsed or written upon the deed in which case no fee shall be payable in respect of the registration thereof.

Description
of land.

21. If the order is indorsed or written upon the deed to be made in pursuance thereof, the real estate to which the same relates may be described in the order by reference to the description contained in the deed.

Case where
action of
dower not
maintainable

22. (1) No action of dower shall be maintained, in case the dowress has joined in a deed to convey the land, or to release her dower therein, to a purchaser for value, though the acknowledgment required by law at the time may not have been made or taken, or though there may have been an informality in the making, taking or certifying such acknowledgment.

Deeds bar-
ring dower
before 2nd
March, 1877,
confirmed.

(2) Nor shall an action of dower be maintained where a husband has before the 2nd day of March, 1877, duly conveyed land of which he was owner, and his wife has before the said day executed a deed or conveyance for the purpose of barring her dower, notwithstanding her husband is not a party to such deed or conveyance, and the said deed or conveyance shall be taken and adjudged to be valid and effectual to have barred her dower in the lands in which such deed or conveyance professed to bar dower, notwithstanding the absence or want of a certificate touching her consent to be barred of her dower, and notwithstanding any irregularity, informality or defect in the certificate (if any), and notwithstanding that such deed or conveyance may not have been executed, acknowledged or certified, as required by any act on or before the said day in force, respecting the barring of dower.

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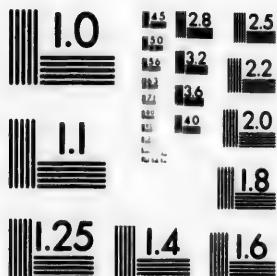
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